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Supreme Court, U.S.
FILED
MAR 29 2001
001500 MAR 29 2001
OFFICE OF THE CLERK

No.

IN THE

# Supreme Court of the United States

JULIO MENDIOLA,

*Petitioner,*

v.

JAMES M. SCHOMIG, Warden,
Pontiac Correctional Center,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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March 29, 2001

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92-PP

## QUESTIONS PRESENTED

1. Whether, under the AEDPA, state court determinations of fact that are the product of unfair procedures are entitled to a presumption of correctness.

2. Whether the AEDPA alters the standards for determining whether, under *Townsend v. Sain*, 373 U.S. 293 (1963), an evidentiary hearing is required in federal court when, through no fault of the petitioner, no evidentiary hearing was ever held in state court.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Julio Mendiola, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1-24, is reported at 224 F.3d 589 (7th Cir. 2000). The district court opinion, App., *infra*, at 25-41, is not reported. The opinion of the Appellate Court of Illinois, First District, App., *infra*, at 42-57, is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on August 10, 2000. A timely petition for rehearing and petition for rehearing en banc was denied by an equally divided court on October 30, 2000. App. 58-59. On January 29, 2001, Justice Stevens extended the time for filing a petition for a writ of certiorari to March 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(d) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–



> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(e)(1) provides as follows:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(2) provides as follows:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–
> (A) the claim relies on--
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

## STATEMENT OF THE CASE

Julio Mendiola was tried on charges of first degree murder before a jury in Cook County, Illinois. Mendiola has always maintained his innocence and testified at trial that he was not involved in the shooting which resulted in the death of Manuel Gutierrez. Tr. F25. The State's case against Mendiola was built on the testimony of a lone eyewitness, whose account varied in some respects, from the undisputed facts of the case and from the accounts of five defense witnesses who claimed that Mendiola was not the shooter.

To bolster this eyewitness's testimony, the prosecution called a 12-year-old girl named Maria Balderrama who had witnessed the shooting. Balderrama testified that she could not actually identify the shooter, because she had not seen his face. Tr. B116, 124. But her description of the shooter as "not that short" was consistent with the testimony of the prosecution's star witness, and rebutted the account of the defense witnesses who maintained that a very short man committed the murder. Tr. B116, D153, E38, E74, E103, E129.

During closing arguments, the prosecution relied heavily on Balderrama's account–telling the jury that, unlike the defense witnesses whom the prosecution argued had various motives to lie on the defendant's behalf–Maria Balderrama had every reason to speak the truth. Tr. F141-42, F149, F197. The jury convicted Mendiola. Tr. F220.

A few weeks after the jury returned its verdict, Mendiola's counsel learned information suggesting that the prosecution had blatantly violated Mendiola's federal constitutional right to disclosure of exculpatory evidence. Maria Balderrama approached Mendiola's defense counsel and explained that while she was on the stand during the trial she saw Mendiola and realized that he was not the person who shot Gutierrez. She did not know Mendiola by name but recognized him from the neighborhood, where she had seen him eating out with his parents on one occasion and in church on two others. Tr. C117-18. She was certain that Mendiola was not the shooter, because Mendiola did not have a ponytail, did not have dark skin and was taller than the person she had seen shoot Gutierrez. Tr. C118-19. More significantly, Balderrama reported that she told this critical information to the prosecutor soon after she stepped off the stand, but the prosecutor told her to keep the information to herself and not share it with Mendiola's family or his counsel. Tr. C123-24.

Mendiola's counsel filed a timely motion for a new trial in the Circuit Court of Cook County alleging that the prosecutor had violated Mendiola's rights to disclosure pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Tr. C105-08. To support his request for an evidentiary hearing, defense counsel presented the state court with a sworn, court-reported statement in which Balderrama detailed her account of her conversation with the prosecutor. Tr. C109-124.

Instead of holding an evidentiary hearing at which the various witnesses could testify about the alleged conversation, the trial judge ruled summarily that no such conversation had ever taken place. App. 61. The judge based this ruling on the comments of a prosecutor named Mr. Rogers who told the court that he had spoken to Mr. Berlin, the prosecutor who was allegedly involved in the conversation. According to Mr.

Rogers, Mr. Berlin denied ever having the conversation that Balderrama was describing. Tr. G12. After hearing this from Mr. Rogers, the trial judge announced as follows:

> I find there was no violations of *** Brady versus Maryland because I accept [assistant state's attorney] Mr. Berlin's word through the representations of [assistant state's attorney] Mr. Rogers here in court. Mr. Berlin being an officer of the court [stated] that he never had a conversation with Maria Balderrama or she stated that Mr. Mendiola was not the shooter. I find that conversation did not exist; that Maria Balderrama a young lady from the community for whatever motivated her, made in fact a false statement to the defense attorneys in the presence of the court reporter post-trial. That assertion due to the fact I find Mr. Berlin to be a credible outstanding state's attorney. He's not in any way encroached nondisclosure under Brady versus Maryland.

App. 61.

On appeal to the Illinois Appellate Court, Mendiola argued that this type of "factfinding" was entirely impermissible and that he was entitled, as a matter of federal constitutional law, to have his evidence heard. The Illinois Appellate Court avoided this issue, because it affirmed the trial court without relying on the trial court's impressions about Mr. Berlin and the trial court's adoption of Mr. Berlin's unsworn, out-of-court statements. Instead, the appellate court declared that

> an appellate court may draw inferences of fact from the record before it. We find the content of Maria Balderrama's post-trial statement regarding the conduct of the assistant State's Attorneys in this case to be highly incredible.

App. 57. The appellate court then stated, "even were we to indulge defendant and accept Ms. Balderrama's statement as true, we cannot say that this evidence was material" pursuant to *Brady*. *Ibid.*

After the Illinois Supreme Court denied Mendiola's petition for leave to appeal, Mendiola filed a petition for habeas corpus in federal court. Because he had never received any evidentiary hearing in state court, Mendiola argued that he was entitled to a federal evidentiary hearing on his *Brady* claim. The district court denied the petition without conducting a hearing, holding that the Illinois Appellate Court's conclusion on the legal issue of "materiality" was not unreasonable. App. 39.

On appeal, a divided panel of the Seventh Circuit affirmed the district court's denial of a federal evidentiary hearing. Unlike the district court, Judges Easterbrook and Manion did not rest their decision on the legal issue of materiality. App. 5. Rather, the Seventh Circuit concluded that the Illinois Appellate Court had determined, as an independent factual basis for its decision, that Maria Balderrama was lying about her supposed conversation with the prosecutor. App. 5-6. According to the Seventh Circuit, the federal courts must presume that the Illinois Appellate Court's "determination of a factual issue" is correct unless Mendiola establishes by "clear and convincing evidence" that Balderrama's statement about what happened is true. App. 6 (quoting 28 U.S.C. §2254(e)(1)). The Seventh Circuit ruled that, in light of the

1996 changes to the federal habeas corpus statute, this presumption of correctness applies regardless of whether the state court ever held a hearing. App. 6-7

Although Mendiola has never been given an opportunity to have an evidentiary hearing in order to show that the state court's determination of fact was incorrect, the Seventh Circuit upheld the denial of a federal evidentiary hearing on the ground that "[p]lenty of support for the [state court's] finding is apparent in this record." App. 7. The Seventh Circuit stated that the trial judge had heard Balderrama's testimony at trial, so he had "ample basis" to discredit her later story. *Ibid.* The Seventh Circuit also contended that it made little sense to believe that Balderrama would "testify as she did and then sing a different song *immediately* after leaving the stand." *Ibid.* Moreover, the Seventh Circuit asserted that there was no problem with the state-court trial judge having rested his decision on the unsworn, out-of-court, un-cross-examined denial by Mr. Berlin. The Seventh Circuit reasoned that prosecutors have "reputational interests in telling the truth." *Ibid.* Moreover, the Seventh Circuit explained, the Illinois courts were entitled to disbelieve Balderrama because believing her meant that "two prosecutors put their law licenses and careers in jeopardy for no good reason." App. 7-8.

The Seventh Circuit then announced that it is entirely acceptable to deny an evidentiary hearing with regard to any claim that depends upon a witness who is testifying at variance with what she said at trial. Regardless of whether some such witnesses will, in fact, be telling the truth *after trial,* the Seventh Circuit concluded that a *per se* rule refusing to credit such post-trial testimony is reasonable because "[k]nowledge that obtaining a recantation will not affect the outcome of the trial makes it less likely that defendants and their friends will hound witnesses after trial." App. 8.

In dissent, Judge Rovner argued that the Seventh Circuit majority had disregarded the fundamental rule that "credibility assessments require an evidentiary hearing." App. 13. Judge Rovner explained that the only acceptable justification for denying Mendiola a hearing on the contested material facts would have been if "no reasonable finder of fact could believe" Balderrama's sworn account. App. 16. But, aside from the Seventh Circuit majority's sanguine assumptions that no prosecutor would ever risk his or her career by engaging in misconduct or lying to a court, there was nothing at all implausible about Balderrama's story. Judge Rovner explained that "[a] factfinder would of course be free not to believe her, but before she can be deemed incredible, her testimony must be heard." App. 17. With regard to the Seventh Circuit majority's assertion that the state court's determination of fact must be presumed correct unless Mendiola disproves it by "clear and convincing evidence," Judge Rovner pointed out that "Mendiola cannot possibly marshal the clear and convincing evidence needed to show that the state courts' credibility assessment is wrong * * * unless and until he is given the chance to put Balderrama on the witness stand." App. 23.

Judge Rovner further explained that the various arguments that the Seventh Circuit majority had posited to support the state court's reasoning did not hold water. For example, the trial judge's having heard Balderrama testify at trial in no way bolstered his ability to assess what she was saying in her post-trial statement because Balderrama's post-trial statement was not inconsistent with her trial testimony. App. 20. At trial, she disclaimed the ability to *identify* the shooter because she never saw his face, but it is obvious that an inability to *identify* someone hardly means an inability to *exclude* a great many people based on stature, complexion, hair, or other non-facial characteristics. App. 19. Moreover,

although the Seventh Circuit majority found it dubious that Balderrama did not volunteer her information while on the stand, Judge Rovner countered that, like any other witness, Balderrama answered the specific questions that were put to her by counsel. She then spoke up immediately upon stepping off the stand–the very first moment in which she could volunteer information as opposed to answer questions. App. 20-21.

Responding to the Seventh Circuit majority's conclusion that the state courts were entitled to dismiss Mendiola's claim without a hearing because prosecutors "have reputational interests in telling the truth," Judge Rovner asserted that this premise "makes insufficient room for the real world." App. 21. Judge Rovner explained that "[n]one of us wants to believe that an officer of the court would instruct a witness to keep exculpatory evidence to herself. But is it beyond the realm of possibility? Regrettably, it is not." App. 16-17 (citing cases in which prosecutors have been found to have engaged in this sort of conduct). Focusing upon that (hopefully small) class of cases in which prosecutors have engaged in misconduct of this sort, Judge Rovner argued that it would not necessarily

> be in his 'reputational interest' to acknowledge the impropriety. Confessing to conduct that amounts to the obstruction of justice will not do much to advance a prosecutor's career. Whatever we might think in the abstract, the important point is that we know that some prosecutors do engage in this sort of misconduct * * * and that they don't always tell the truth about it. Balderrama's allegations are within the realm of possibility. Under the circumstances, the trial judge was obligated to hear both

> Balderrama and the prosecutor testify before deciding who was telling the truth.

App. 22.

Finally, Judge Rovner rejected the Seventh Circuit majority's ruling that the state court's determination of fact--issued with no hearing--could be sustained on the basis of public policy considerations that support a *per se* rule against believing "recanting" witnesses. Aside from the problem with characterizing Maria Balderrama as a "recanting" witness, Judge Rovner explained that this reasoning violates core principles of individualized justice:

> Recantations *should* be viewed with a healthy dose of skepticism, for all of the reasons my colleagues have cited. But as we know, witnesses don't always wait until after they leave the courtroom to dissemble. Just as a witness may recant her testimony later to appease the defendant and his allies, she may also lie in the first instance, perhaps to appease the prosecution, to protect someone else, or to exculpate herself. In short, the recantation on occasion represents the truth. Deciding when that is so is by no means an easy task, and when the trial judge has given the witness's change of heart due consideration, his judgment is entitled to our deference. But when a court rejects a plausible recantation out of hand, without any of the process that attends a valid credibility assessment, we owe the court's finding no respect.

App. 22-23. Judge Rovner concluded that "[t]his case should be remanded to the district court for the evidentiary hearing that the state courts have refused to give Mendiola." App. 23.

Mendiola's petition for rehearing and petition for rehearing en banc was denied in an equally divided 5-5 vote by the court. App. 58-59.

## REASONS FOR GRANTING THE WRIT

The Seventh Circuit has held that even though the defendant presented a sworn statement by a witness who claimed firsthand knowledge that the prosecution violated the defendant's *Brady* rights, the defendant was not entitled to an evidentiary hearing on that claim in any court. Rather, without hearing any evidence from the defense or the prosecution, it was acceptable for the state court to summarily decide that the allegation of prosecutorial misconduct was "highly incredible." According to the Seventh Circuit, once such a "determination of fact" has been made, it must be respected on federal habeas corpus review unless the defendant can somehow prove through clear and convincing evidence that the determination was mistaken. Yet, the defendant has no right to present any evidence in federal court in his effort to satisfy that burden. This analysis is deeply flawed.

There is absolutely no precedent, and no justification, for the Seventh Circuit's extraordinary conclusion that because most prosecutors do not engage in misconduct, it is "reasonable" for a state court to summarily reject any allegation claiming that a particular prosecutor engaged in misconduct. Nor have we found any case in which a court has approved of a procedure whereby findings on contested facts may be issued based on the out-of-court denials of the accused party, without the accusing party ever being giving the chance to present its

evidence. Part and parcel of any right, including the right recognized in *Brady v. Maryland,* is the right to present evidence to show that the right has been violated. The Seventh Circuit's majority has rendered that right meaningless.

It is true that a court may reject a claim without holding an evidentiary hearing when the allegation is plainly frivolous–when it is, on its face, so fantastic or delusional that it cannot possibly be true. But there is nothing remotely impossible about Maria Balderrama's account, and the panel majority's suggestion that it is inherently implausible that any prosecutor would engage in this type of misconduct is sadly out of touch with reality. See generally Ken Armstrong & Maurice Possley, *Trial & Error; How Prosecutors Sacrifice Justice to Win*, Chicago Tribune, Jan. 10, 2000 at 1 ("Since a 1963 U.S. Supreme Court ruling designed to curb misconduct by prosecutors, at least 381 defendants nationally have had a homicide conviction thrown out because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false."). There is no reason to suggest that prosecutors violate laws and rules more frequently than do those in other professions. But there is surely no cause for the court to pretend that all prosecutors are above misconduct and that all allegations of prosecutorial misconduct can be dismissed as incredible.

The basis of the Seventh Circuit's erroneous decision was its construction of the federal habeas statute 28 U.SC. § 2254. The court misconstrued the statute to require federal courts to afford a presumption of correctness to the factual conclusions of the state courts even when there was nothing close to a semblance of full and fair factfinding in the state courts. Moreover, the Seventh Circuit wrongly held that a defendant has no right to a federal evidentiary hearing because of the presumption of correctness. As will be seen, these

constructions of section 2254 are at odds with the decisions of several other circuit courts of appeals. This Court should grant certiorari to resolve those conflicts and to establish that, although AEDPA made several significant changes in federal habeas corpus procedure, it did not alter the core right of citizens to have evidentiary hearings on the constitutional claims they properly have advanced.

## I. THE SEVENTH CIRCUIT MAJORITY FAILED TO RECOGNIZE THAT STATE COURT DETERMINATIONS OF FACT THAT ARE THE PRODUCT OF INADEQUATE PROCEDURES ARE NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS.

Contrary to the Seventh Circuit's analysis, the federal habeas statute only entitles a state court determination of fact to a presumption of correctness if the determination was made in a reasonable procedural manner. Section 2254(d)(2) provides that habeas corpus may be granted if the state court's adjudication of a claim "resulted in a decision that was based on an *unreasonable determination of the facts in light of the evidence presented in the State court proceeding*." 18 U.S.C. § 2254(d)(2) (emphasis added). Section 2254 (e)(1), in turn, provides that "a determination of a factual issue made by a state court shall be presumed to be correct" unless the applicant has borne "the burden of rebutting the presumption of correctness by clear and convincing evidence."

It is clear from both sections 2254(d)(2) and 2254(e)(1) that a state court "determination of fact" that is the product of unreasonable procedures is entitled to no presumption of correctness at all–that the presumption of correctness can be rebutted by a showing, through clear and convincing



evidence, that the state court's procedures were inadequate. As the leading treatise on federal habeas corpus explains, even after AEDPA, a state-court determination of fact must be the product of fair procedures to be entitled to any presumption of correctness. See 1 James Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 20.2c, at 753-54 (section 2254(d)(2) requires the federal court to look at "whether the state court engaged in a procedurally reasonable factfinding process").[1]

The Seventh Circuit's decision to afford a presumption of correctness in the absence of adequate procedures in the state courts is completely at odds with the decisions of several other circuit courts of appeals. For example, in *Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999), the Ninth Circuit held that no presumption of correctness applies to a state-court judge's "findings" which "were not subject to any of the usual judicial procedures designed to ensure accuracy." *Weaver*, 197 F.3d at 363. The habeas corpus claim in

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[1] The following example illustrates the critical distinction between the Seventh Circuit's holding and the actual requirements of the statute. Assume that the prosecutor in this case had submitted an affidavit rebutting Ms. Balderrama's claims, and that the trial judge then announced that instead of hearing any evidence, he had flipped a coin and the prosecution had prevailed. According to the Seventh Circuit, this "determination of fact" would be entitled to a presumption of correctness and a defendant who sought to challenge this "determination of fact" could not prevail by attacking the arbitrariness of procedure that was used in state court. Instead, he could only prevail if he could somehow show–without any chance to present evidence–that Ms. Balderrama was, in fact, the truthful witness. In many ways, what happened in this case is even more egregious than this hypothetical. Here, Mendiola never had a 50/50 chance at success. His efforts to persuade the court were foreclosed by the trial judge's assumption that he knew the prosecutor well enough to know–without ever hearing the relevant evidence–that any allegation of misconduct was necessarily unfounded.

*Weaver* turned on the factual question of how the bailiff and the judge had answered one of the jury's questions. Instead of hearing evidence on the issue, the state trial court had relied upon the bailiff's informal representations to the court. The Ninth Circuit held that because the "bailiff was not under oath when relaying her account of events to the judge, and neither the judge nor the bailiff was ever questioned by counsel for either side," the state-court judge's assessment of what happened was not the sort of factual determination that is entitled to any deference, and that a federal hearing was necessary. *Ibid.*

Similarly, in *Torres v. Prunty,* 223 F.3d 1103 (9th Cir. 2000), the state court had refused the defense's request for a competency hearing and had summarily concluded that the defendant was competent to stand trial based on the trial judge's stated belief that defendant's claims of delusions were disingenuous. On federal habeas review, the Ninth Circuit explained that even though a trial court finding of this sort is ordinarily given deference on collateral review, no such deference is in order where the "factfinding procedure by the judge was clearly inadequate." *Id.* at 1109. "At the very least," the Ninth Circuit explained, "the trial court could not have concluded reasonably that Torres was disingenuous without inquiring of Torres himself, or of [the expert witness the defense sought to present]." *Ibid.* Because the state courts had conducted no hearing when one was necessary, the Ninth Circuit held that "the state courts' factual determinations were unreasonable within the meaning of § 2254(d)(2)." *Id.* at 1110 n.6. Moreover, the court explained that it followed, "of necessity, that on the existing record Torres has rebutted the 'presumption of correctness' of [the state courts'] findings 'by clear and convincing evidence.' See § 2254(e)(1)." *Ibid.*

Other circuit courts of appeals have also agreed that no deference is afforded state-court factual determinations that were not the product of full and fair adjudications. See, *e.g*, *Mayes v. Gibson*. 210 F.3d 1284, 1289 (10th Cir. 2000) ("federal courts need not give presumption of correctness to factual findings of the state court if the habeas petitioner did not receive a full, fair, and adequate hearing in the state court proceeding on the matter raised in the habeas petition"); *Morris v. Cain*, 186 F.3d 581, 584 (5th Cir. 1999) ("A full and fair adjudication of a petitioner's claim is a prerequisite for application of AEDPA's review provisions."). *Cf. Nevers v. Killinger*, 169 F.3d 352, 373-74 (6th Cir. 1999) (state court's conclusions were entitled to no deference because the state court's failure to hold a hearing to consider claim of outside influence upon jury was itself a constitutional violation of due process).

The Seventh Circuit's decision is in clear conflict with these cases. As Judge Rovner explained, it is clear that the procedure the state court used to make its factual determination cannot be deemed a reasonable way to make a credibility assessment between two conflicting witnesses. The defense had the right to present the testimony of Maria Balderrama, to cross-examine Mr. Berlin, and to present any other evidence that it had in support of its claim. For example, if the defense presented evidence that Ms. Balderrama had reported her interaction with the prosecutor to her family and friends on the very day that it happened, that evidence would be highly material to assessing her veracity. The defense was never given the opportunity to present any such evidence, however, because no court has

allowed the defense to present evidence in support of its claim.[2]

The Seventh Circuit's holding that a state trial court's off-the-cuff dismissal of a serious factual allegation–without even a pretense of a meaningful hearing–is the type of factual finding that is entitled to deference is a gross distortion of AEDPA. This court should grant certiorari to address the important and recurring issue of when AEDPA's presumption of correctness applies.

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[2] The Seventh Circuit cited two cases for the proposition that "[w]hen dealing with contentions that prosecutors have exercised peremptory challenges improperly, judges are entitled to credit prosecutors' explanations without placing them under oath." App. at 7 (citing *Purkett v. Elem*, 514 U.S. 765 (1995), and *Hernandez v. New York*, 500 U.S. 352 (1991)). But in those cases, the trial judge did hear directly from the prosecutor in question and the defendant was given a full opportunity to present any evidence he wished to support his claim. Here, by contrast, the trial judge not only failed to take the prosecutor's account in open court, he also summarily terminated the factual inquiry without ever giving the defense the chance to present its side of the story. Moreover, in the peremptory challenge context, the defense possesses no direct evidence of prosecutorial misconduct–its unsworn challenge is countered with an unsworn response. Here, again by contrast, the defense was prepared to present a witness who, under oath, would recount her first-hand knowledge of the alleged misconduct. There is no precedent for precluding that testimony and deciding the case on the basis of an unsworn, out-of court statement of a prosecutor. In any event, the Illinois Appellate Court eschewed any reliance on the prosecutor's unsworn statements.

## II. THE SEVENTH CIRCUIT IGNORED THE CRITICAL DISTINCTION BETWEEN A DEFENDANT'S ENTITLEMENT TO FEDERAL RELIEF AND HIS ENTITLEMENT TO A FEDERAL EVIDENTIARY HEARING.

Even were the Seventh Circuit correct in applying a presumption of correctness in the absence of a full and fair factfinding, that presumption would not support the denial of an evidentiary hearing in federal court so that Mendiola could have an opportunity to rebut the presumption. The only question in this case is whether Mendiola is entitled to an evidentiary hearing in federal court, given the fact that he has–through no fault of his own–never been given the opportunity to develop the facts in support of his claim in state court. The Seventh Circuit majority answered this question by declaring that the state court's determination of facts are presumed correct and that Mendiola may only rebut that presumption by showing clear and convincing evidence that Maria Balderrama was telling the truth. This is a non sequitur.

The presumption of correctness has nothing to do with the right to a federal hearing to present the facts that will serve to rebut the presumption. The Seventh Circuit's approach reflects a profound misunderstanding of the statute. Even when a presumption of correctness applies, a habeas petitioner is still entitled to a hearing in federal court to develop facts that he has been prevented from developing in state court. See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) (the issue of entitlement to a federal hearing is distinct from the question of whether the statute presumes the state court's decision to be correct). See generally 1 James Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 20.2d, at 756-58 (3d ed. 1998).

A *presumption* of correctness is just that–a *presumption*. The statute makes clear that it is *rebuttable* by clear and convincing evidence. The way for the habeas applicant to rebut the presumption–if he has been precluded from developing the relevant facts in the state court–is through an evidentiary hearing in federal court. This is the essential, and still vital, holding of *Townsend v. Sain*: a federal court must grant an evidentiary hearing if the "factfinding procedure employed by the state court was not adequate to afford a full and fair hearing" or if "it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Townsend v. Sain*, 373 U.S. 293, 313 (1963). See also *Tamayo-Reyes*, 504 U.S. at 11.[3]

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[3] Before the enactment of the AEDPA, a federal habeas petitioner's request for an evidentiary hearing was controlled by Rule 8(a) of the Rules Governing § 2254 Cases and by this Court's decision in *Townsend* as modified by *Tamayo-Reyes*. Rule 8(a) provides that "[i]f the petition is not dismissed at a previous stage in the proceeding," the district court "shall determine whether an evidentiary hearing is required." Fed. R. Gov. Sec. 2254 Cases 8(a). In *Townsend*, this Court held that a federal evidentiary hearing is mandatory "where an applicant for a writ of habeas corpus allege[d] facts which, if proved, would entitle him to relief" and "the habeas applicant did not receive a full and fair evidentiary hearing in a state court." *Id.* at 312-13. This Court then elaborated on its standard for mandatory federal evidentiary hearings, noting that a state court fails to provide a full and fair hearing whenever: (1) the merits of the factual dispute were not properly resolved; (2) the factual determination is not fairly supported by the record as a whole; (3) the court employed inadequate fact-finding procedures; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) if for any other reason, it appears that the state court failed to provide a full and fair hearing of the facts. *Id.* at 313.

*Townsend* set the standard until 1992, when this Court, in *Keeney v. Tamayo-Reyes*, altered the showing required under *Townsend*'s fifth factor. Prior to *Keeney*, in situations where material facts were not adequately developed in the state court record due to the fault of petitioner

*Townsend* continues to control this issue. The only part of AEDPA that limits *Townsend* with respect to a defendant's entitlement to a hearing is section 2254(e)(2), which generally precludes a federal evidentiary hearing "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings." See *Murphy v. Johnson*, 205 F.3d 809, 815 (5th Cir. 2000) (if the case does not fall within § 2254(e)(2), the assessment of petitioner's entitlement to federal hearing is governed by rules established in "[o]ur pre-AEDPA jurisprudence"); *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998) (same); *Cardwell v. Greene,* 152 F.3d 331, 337 (4th Cir. 1998) (same). As this Court recently made clear, section 2254(e)(2) only affects cases in which "there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 120 S. Ct. 1479, 1488 (2000). Obviously, Julio Mendiola is not barred from a hearing by section 2254(e)(2), and just as obviously, he is entitled to a hearing pursuant to the standards established in *Townsend*.

The Seventh Circuit rejected this reasoning, holding that even though Mendiola would have been entitled to an evidentiary hearing under the pre-AEDPA statute as

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or his attorney, the petitioner was required to show only that he did not deliberately bypass the opportunity to present facts to the state forum. *Keeney,* 504 U.S. at 5. In *Keeney,* this Court overruled *Townsend* to the extent that *Townsend* required the application of the "deliberate bypass" standard in such circumstances, and instead invoked a heightened standard, requiring a petitioner alleging inadequate development of material facts in the state court to show cause for his failure to develop an adequate factual record and prejudice resulting from that failure. *Keeney,* 504 U.S. at 10 (1992). This Court explained: "Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits." *Id.* at 10.

interpreted in *Townsend*, AEDPA had somehow changed the law to make a federal evidentiary hearing unavailable. See App. 6-7 (discussing "major difference between § 2254(e), part of the Antiterrorism and Effective Death Penalty Act of 1996, and its predecessor 28 U.S.C. § 2254(d) (1994). The former statute required deference to 'a determination after a hearing on the merits of a factual issue' unless one of eight conditions was satisfied. Section 2254(e), by contrast, omits any mention of a hearing.").

The Seventh Circuit's treatment of this point was in keeping with its earlier decision in *Burris v. Parke*, 116 F.3d 256 (7th Cir. 1997). In *Burris*, Judges Easterbrook and Manion–the same two judges who made up the majority in this case–declared that § 2254(e) limits *Townsend* generally. *Id.* at 259. Judge Cudahy dissented in *Burris*, explaining that *Townsend* remains good law in that "when the state courts have refused to hear the claim of a state prisoner, *Townsend* still binds us to ensure that the petitioner receives a hearing in federal court." *Id.* at 261.

The Seventh Circuit has transformed the rebuttable presumption of correctness into a presumption that is, for all practical purposes, irrebuttable because there is no opportunity to ever rebut it. The panel created a vicious catch-22 by holding that the petitioner can only get a hearing if he can rebut the presumption of correctness. Yet, it is clear that the defendant can only rebut that presumption if he has a hearing within which to develop the facts. The statute does not support any such circularity. A defendant is entitled to a hearing if he has made claims that would entitle him to relief and he has not had an opportunity to develop them factually in state court. Only after that hearing has occurred can the court decide whether the petitioner has presented sufficient evidence to rebut the presumption of correctness. It is

critical that this Court consider this issue to ensure that AEDPA is not misapplied in a manner that forecloses meaningful federal habeas corpus review.

## CONCLUSION

For the reasons set forth above, petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari. In the alternative, in the event that the Court believes that the violation of Julio Mendiola's right to a federal evidentiary hearing is so manifest that this case does not merit plenary consideration, petitioner respectfully asks this Court to summarily reverse the judgment of the court below and direct that the case be remanded for an evidentiary hearing in district court.

Respectfully submitted,

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MARCH 29, 2001

# APPENDIX

In the

# UNITED STATES COURT OF APPEALS
# FOR THE SEVENTH CIRCUIT

No. 98-4031

JULIO MENDIOLA,

*Petitioner-Appellant,*

v.

JAMES M. SCHOMIG, Warden,
Pontiac Correctional Center,
*Respondent-Appellee.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 3183-Charles P. Kocoras, *Judge.*

ARGUED JANUARY 4, 2000 - DECIDED AUGUST 10, 2000

Before EASTERBROOK, MANION, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* During the wake for a member of the Latin Kings street gang, four non-members drove by. Incensed, gang members standing outside the funeral home opened fire on the car, which sped away. Within a block the car crashed into other vehicles. Three of the four occupants made it to safety on foot. Manuel Gutierrez, the fourth, did not. As a mob beat Gutierrez, one assailant shot Gutierrez six times, killing him. A jury concluded that Julio Mendiola fired the fatal bullets, and he was sentenced to 50 years' imprisonment for

first-degree murder. His conviction was affirmed by the state's appellate court, and a federal judge denied his petition for collateral relief. 1998 U.S. Dist. LEXIS 16995 (N.D. Ill. Oct. 21, 1998). Mendiola's sole contention on this appeal is that the prosecutor withheld material exculpatory evidence, violating the due process clause of the fourteenth amendment. See *Brady v. Maryland*, 373 U.S. 83 (1963).

Eyewitness testimony supplied the basis of the conviction. Francisco Carabez identified Mendiola as the shooter. Immediately after the murder, Carabez and his friend Angelo Torres went looking for the killer. Carabez described the shooter's appearance and clothing to Torres, and when the two found Mendiola within a block of the crime Carabez unhesitatingly identified him to Torres based on his clothing as well as his visage. Carabez later identified Mendiola in a photo spread, a lineup, and the courtroom. Torres corroborated Carabez's description of the events immediately after the murder. Mendiola's defense was an alibi (that he had been drinking beer with two friends in a car some distance from the murder); one of the supposed drinking companions verified this story; several witnesses testified that Mendiola was not the shooter; Mendiola himself testified that he had nothing to do with the killing or, for that matter, the Latin Kings. This defense was undercut by a police officer's testimony that the tattoo of a crown on Mendiola's back is the insignia of the Latin Kings, that the officer had observed Mendiola associate with other gang members and use the gang's slogans and gestures, that in a booking photograph Mendiola posed using a hand gesture employed by the Latin Kings, and that soon after being arrested Mendiola had given accounts of his whereabouts that conflicted with the alibi offered at trial. Another officer testified that, when arrested, Mendiola had admitted membership in the Latin Kings. Some if not all of the witnesses who testified on Mendiola's behalf had links to that gang, and

the prosecutor argued that their testimony should be discounted accordingly.

Although the murder took place in daylight on a busy street, police and prosecutors had difficulty finding people willing to cooperate. Only one witness to the attack other than Carabez testified for the prosecution, and that witness, Maria Balderrama, was unable (or unwilling) to identify the shooter. Balderrama, who was 12 at the time of the shooting and trial, testified that she had been playing on the street when the affray erupted. She corroborated Carabez's description of the attempted escape, the mob descending on Gutierrez, the beating, and the murder. But when asked for identifying details, all Balderrama would say was that the shooter was "not that tall and not that short," and "not that fat and not that skinny." She viewed a lineup but did not identify anyone. She did not recall what the slayer was wearing. On cross examination, Balderrama stated that she did not get a good look at the killer and did not see his face. The detective who conducted the lineup testified that Balderrama had appeared to be very scared and hesitated even to view the lineup until she was assured that the people in the lineup could not see her—an assurance that obviously did not apply to the trial.

On the day of sentencing, Mendiola filed a motion for a new trial. The principal support for that motion was the transcript of a statement that Balderrama made to Mendiola's lawyer, in his office, two weeks after the trial. Balderrama told counsel in response to leading questions that, during her time on the stand, she came to believe that Mendiola was not the shooter. According to her statement, after the completion of her testimony she expressed this opinion to one of the two prosecutors, who asked her not to tell Mendiola's lawyer. It is uncontested that the state never informed defense counsel that Balderrama wanted to change her testimony from an agnostic position to one favoring Mendiola. Failure to convey that

information, Mendiola insisted, violated the prosecution's obligation under the due process clause to disclose material exculpatory information.

The trial judge denied Mendiola's request for a new trial and also declined to hold an evidentiary hearing to learn whether Balderrama would repeat in court the statements made in defense counsel's office. The judge concluded that, no matter what Balderrama later said, she had *not* exculpated Mendiola immediately after leaving the stand, and that, as a result, the prosecution had not violated its constitutional obligation. In an unpublished opinion, the court of appeals observed that it, too, was entitled to draw inferences from the record, and it agreed with the trial judge that "the content of Maria Balderrama's post-trial statement regarding the conduct of the assistant State's Attorneys in this case [is] highly incredible." Then the appellate court added that, even if Balderrama's post-trial statement were true, her change of mind would not have been material exculpatory evidence, because Balderrama had denied seeing the shooter's face. When denying Mendiola's petition, the district court concluded that the state court's decision on the materiality issue did not represent an unreasonable application of clearly established federal law, see 28 U.S.C. §2254(d)(1), making federal collateral relief unavailable.

If Balderrama told the prosecutor that she was confident that Mendiola did not shoot Gutierrez, then the critical question is whether "there is a reasonable probability" that this information would have altered the outcome of the trial. *Strickler v. Greene,* 527 U.S. 263, 280 (1999); *Kyles v. Whitley,* 514 U.S. 419, 433-34 (1995). Although this sounds like a demand for quantification, *Strickler* and *Kyles* say that the inquiry is subjective: "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he

received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles,* 514 U.S. at 434, reiterated by *Strickler,* 527 U.S. at 289-90. When the constitutional standard is flexible, and the state court takes the rule seriously and produces an answer within the range of defensible positions, §2254(d)(1) requires the federal court to deny the petition. "[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored." *Lindh v. Murphy,* 96 F.3d 856, 871 (7th Cir. 1996) (en banc), reversed on other grounds, 521 U.S. 320 (1997). See also *Williams v. Taylor,* 120 S. Ct. 1495, 1518-23 (2000); *Gardner v. Barnett,* 199 F.3d 915 (7th Cir. 1999) (en banc); *Tenner v. Gilmore,* 184 F.3d 608 (7th Cir. 1999). That Balderrama had denied under oath seeing the incident clearly enough to make an identification, had disclaimed seeing the shooter's face and was unable even to describe his body type, means that her testimony did not support his conviction other than by corroborating Carabez's description of the sequence of events. Her change of mind did not affect this aspect of her testimony, the only one that mattered. Yet it cannot be gainsaid that Mendiola would have been helped by support from Balderrama, for the prosecutor could not have responded that she was affiliated with the Latin Kings-although the prosecutor would have emphasized the incompatibility between Balderrama's new position and her earlier professed inability to see details about the shooter's appearance. Because arguments can be made both ways, it is hard to call the state court's resolution unreasonable, in the objective sense adopted by the Supreme Court in *Williams.*

But we need not rest on that ground, because both the trial court and the state appellate court found that Balderrama did not tell the prosecutor that she had come to believe that Mendiola did not shoot Gutierrez. The appellate court's statement—that "the content of Maria Balderrama's post-trial

statement regarding the conduct of the assistant State's Attorneys in this case [is] highly incredible"—was not, as Mendiola would have it, a throw-away line. It was an independent ground of decision, offered only after the court observed that it had an independent right to draw inferences from the record. Under federal law, that finding of fact is dispositive.

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. §2254(e)(1). Mendiola has not established by "clear and convincing evidence" that Balderrama's post-trial statement, effectively a partial recantation of her trial testimony, must be preferred to the testimony given under oath. Mendiola has not seriously tried to do this; he has no evidence other than Balderrama's statement. Instead his principal contention is that conclusions reached by state judges in the absence of an evidentiary hearing are not "really" findings of fact and fall outside §2254(e).

The foundation of Mendiola's position-that only trial judges may make factual findings, and then only after hearings dedicated to the contested issue—is unsound. *Sumner v. Mata,* 449 U.S. 539, 546-47 (1981), holds that state appellate courts' findings are entitled to the same respect that trial judges' findings receive. What is more, §2254(e)(1) does not require findings to be based on evidentiary hearings. This is a major difference between §2254(e), part of the Antiterrorism and Effective Death Penalty Act of 1996, and its predecessor 28 U.S.C. (1994 ed.) §2254(d). The former statute required

deference to "a determination after a hearing on the merits of a factual issue" unless one of eight conditions was satisfied. Section 2254(e), by contrast, omits any mention of a hearing. If a state court's finding rests on thin air, the petitioner will have little difficulty satisfying the standards for relief under §2254. But if the state court's finding is supported by the record, even though not by a "hearing on the merits of [the] factual issue", then it is presumed to be correct.

Plenty of support for the finding is apparent in this record. The trial judge heard Balderrama's testimony at trial, which supplied ample basis for the judge to disbelieve a later inconsistent story. See *United States v. Provost,* 969 F.2d 617, 619-20 (8th Cir. 1992). Cf. *United States v. Stewart,* 198 F.3d 984 (7th Cir. 1999) (statements made under oath when pleading guilty are conclusive, and the judge may reject without a hearing a defendant's later contention that his sworn statements were untrue). Balderrama's statement to Mendiola's lawyer made little sense. Why would she testify as she did and then sing a different song *immediately* after leaving the stand? The trial judge observed not only Balderrama but also the prosecutors. In response to Mendiola's post-trial motion, both prosecutors denied that Balderrama had told them that she had concluded that Mendiola did not shoot Gutierrez. Neither prosecutor testified under oath (and one relayed his recollections by hearsay through the other), but both had reputational interests in telling the truth. When dealing with contentions that prosecutors have exercised peremptory challenges improperly, judges are entitled to credit prosecutors' explanations without placing them under oath. *Purkett v. Elem,* 514 U.S. 765 (1995); *Hernandez v. New York,* 500 U.S. 352 (1991). We see no greater reason why a formal hearing is required when the subject is what a witness told a prosecutor. If Balderrama's post-trial statement is correct, then two prosecutors put their law licenses and careers in jeopardy for no

good reason; the trial judge (and the state's appellate court) were entitled to think it more plausible that Balderrama did not recant until the post-trial interview with Mendiola's lawyer.

Disbelief of recantations is sensible—and not just because the formality of a court, the presence of the litigants, and the gaze of a judge induce witnesses to hew more closely to the truth than they do when speaking in private and attempting to appease the losing side's advocate. Disbelief is reasonable because it protects witnesses after trial, and thus promotes truthful testimony during trial. See *Hyseer v. Florida,* 315 U.S. 411, 422 (1942). Some witnesses fall prey to influences—perhaps the persuasive influence of a skilled advocate asking leading questions, perhaps the less wholesome influence of the defendant's friends. See Charles Alan Wright, 3 *Federal Practice and Procedure* §557.1 (2d ed. 1982). Both may have been at work with Balderrama. People fear the Latin Kings for a reason. By disbelieving recantations, judges protect witnesses such as Balderrama. Knowledge that obtaining a recantation will not affect the outcome of the trial makes it less likely that defendants and their friends will hound witnesses after trial. Witnesses who are nonetheless pursued may protect themselves by telling defendants' friends (and lawyers) what they want to hear, knowing that recantation will not jeopardize an accurate verdict already delivered.

Four state judges (one trial judge, three appellate judges) chose to believe Balderrama on the witness stand over Balderrama in the office of Mendiola's lawyer, and to believe two members of the bar rather than to credit a recantation by a fearful witness. That decision has not been undercut by clear and convincing evidence, so the judgment of the district court is

AFFIRMED.

ROVNER, *Circuit Judge,* dissenting. It is our obligation in habeas corpus to defer to the state courts, not to clean up after them. The trial judge in this case left a gaping hole in the record when he "found" that Maria Balderrama lied and the prosecutor she accused of suppressing evidence told the truth, without bothering to hear either one of them testify. Rather than remanding for an evidentiary hearing, the Illinois appellate court compounded the problem when, "draw[ing] inferences of fact from the record," it dismissed Balderrama's post-trial statement as "highly incredible." Today, my colleagues conclude not only that no harm was done, but that it is an entirely "sensible" approach for courts to disbelieve recantations as a matter of principle, whatever the circumstances. *See ante* at 7. Their reasoning would summarily foreclose relief not only to Mendiola, but to *any* defendant convicted on the testimony of an eyewitness who later recants, and I cannot join it.

1.

Maria Balderrama was a key prosecution witness whose impartiality the prosecutors trumpeted in closing arguments. She did not identify Mendiola as the man who shot Manuel Gutierrez, but she corroborated the testimony of the one and only witness who did—Francisco Carabez. The prosecutor's own words reveal how important she was to the State's case:

> What else do you have, ladies and gentlemen? Maria Balderamma [*sic*]. Let's talk about Maria Balderamma [*sic*] for a second. Thirteen-year-old girl that came in and told you what she saw. She saw and she heard the victim begging for his life. She tells you he's laying there on the ground saying, I'm not nothing, I'm not nothing, don't shoot me, please don't shoot. She says the man took out the gun, fired the gun numerous times. And what's her description of the shooter? Not too tall, not too short, Was he fat?

> No, not really fat. Was he thin? No, not really thin. Not what the Latin King members, the defense witnesses, tell you a concocted defense of some short, fat guy. Maria Balderamma [*sic*) was right across the street. She says she couldn't see his face. She was trembling when she viewed the lineup.
>
> *What she tells you, ladies and gentlemen, supports everything that Francisco Carabez said, everything he said about what happened.*

F141-42 (emphasis added). *See also id.* at F149 ("And you know Francisco Carabez is telling the truth because it's supported by all of the evidence in this case."); F197 ("Two credible witnesses, Angelo Torres, is enough. Maria Balderamma [*sic*] is enough.").

Balderrama's sworn post-trial statement was as material as her testimony at trial. What she alleges is that while she was on the witness stand, she realized that Mendiola was not the person who shot Gutierrez. She recognized Mendiola (whom she did not know by name) from the neighborhood, where she had seen him eating out with his parents on one occasion and in church on two others. C117-18. And she was "positive" that Mendiola was not the shooter, because Mendiola did not have a ponytail, did not have dark skin, and was taller than the person she had seen kill Gutierrez. C118-19. Balderrama goes on to allege that immediately after she testified (and while the trial was still underway), she approached one of the prosecutors and repeatedly told him that "[t]hat is not the guy" who shot Gutierrez. C123. He instructed her to say nothing to either Mendiola's attorneys or his parents, however, and until the trial was over, she heeded that instruction. C123-24.

If Balderrama is telling the truth, the prosecutor suppressed exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194 (1963). By Balderrama's account, she

got enough of a look at the shooter and had enough of a visual acquaintance with Mendiola to know that he was not the killer. Her testimony to that effect would have left the State without the corroboration of Carabez's testimony that it so emphasized in arguments to the jury. That corroboration cannot be dismissed as cumulative or immaterial. By all accounts, the events that culminated in the murder of Gutierrez unfolded very quickly in a chaotic environment. Because there was no physical evidence implicating Mendiola in the murder, the State's case rested almost entirely on eyewitness testimony—and in great measure upon the testimony of a single witness, Carabez. Balderrama was the only prosecution witness who could confirm Carabez's account of what occurred and his description of the person who shot Gutierrez. (Torres could only testify as to what Carabez told him.) She also was, as my colleagues acknowledge, one of very few witnesses whose credibility was unimpeached. *Ante* at 5.

One need only look to *United States v. Agurs,* 427 U.S. 97, 96 S. Ct. 2392 (1976), for confirmation that the assertions in Balderrama's post-trial statement are material. In *Agurs,* the Supreme Court held that the prosecutor's suppression of exculpatory evidence in violation of *Brady* will demand a new trial "if the omitted evidence creates a reasonable doubt that did not otherwise exist[.]" *Id.* at 112, 96 S. Ct. at 2402. By way of illustration, the Court remarked:

> If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitnesses. . . .

*Id.* at 112 n.21, 96 S. Ct. at 2402 n.21, quoting Comment, *Brady v. Maryland* and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 125 (1972). This is almost exactly the

situation we have here. One of the two eyewitnesses who were central to the State's case purportedly told the prosecutor that Mendiola was not the assailant, and this exculpatory information was kept from the defense until after he was convicted. In view of the fact that the State relied upon Balderrama to bolster the testimony of the only witness who could identify Mendiola as the killer, her statement (if credited) creates "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 1948 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985)); *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 1565 (1995).[1]

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[1] *See, e.g.*, *Kyles*, 514 U.S. at 445, 115 S. Ct. at 1571 ("the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others . . . .") (citing *Agurs*); *Cannon v. Alabama*, 558 F.2d 1211, 1215-16 (5th Cir. 1977) (new trial ordered where government failed to disclose eyewitness who had identified someone other than defendant as perpetrator), *cert. denied*, 434 U.S. 1087, 98 S. Ct. 1281 (1978); *Jackson v. Wainwright*, 390 F.2d 288, 298-99 (5th Cir. 1968) (new trial ordered where prosecution failed to disclose pre-trial statements of eyewitness who said assailant had lighter complexion than defendant); *United States ex rel. Meers v. Wilkins*, 326 F.2d 135, 138-40 (2d Cir. 1964) (new trial ordered where prosecution failed to disclose two eyewitnesses who told police that defendant did not participate in robbery); *Watkins v. Miller*, 92 F. Supp. 2d 824, 843-47 (S.D. Ind. 2000) (Hamilton, J.) (habeas corpus granted where prosecution failed to disclose, *inter alia*, existence of eyewitness who observed abduction of murder victim at time when defendant had solid alibi and who gave description of abductor that could not have been defendant); *United States v. Sheehan*, 442 F. Supp. 1003, 1008-09 (D. Mass. 1977) (new trial ordered where government failed to disclose existence of only eye-witness who saw unmasked faces of bank robbers and who was unable to identify defendant as one of the robbers); *In re Kapatos*, 208 F. Supp. 883, 888-89 (S.D.N.Y. 1962) (habeas corpus granted and new trial ordered where State failed to disclose pre-trial statement and grand jury testimony of witness who indicated that defendant was not one of two men he saw fleeing scene of murder).

**2.**

The key question, of course, is whether Balderrama's post-trial assertions are credible. But for what has transpired in this case, there would be no need to point out that credibility assessments require an evidentiary hearing. We honor that rule probably more than a hundred times a year in reviewing summary judgment rulings alone. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986). The reasons are as familiar as the rule. Ascertaining whether a witness is telling the truth—as yet an entirely unscientific task—demands an opportunity for the factfinder to look her in the eye, observe her demeanor, note the dryness of her brow, hear the inflections in her voice, and in general to observe how she holds up on cross-examination. *E.g.*, *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575, 105 S. Ct. 1504, 1512 (1985); *United States v. Mancillas*, 183 F.3d 682, 701 n.22 (7th Cir. 1999) (quoting *United States v. Garcia*, 66 F.3d 851, 856 (7th Cir. 1995)), *cert. denied*, 120 S. Ct. 1271 (2000). Cold paper records supply none of this information.

What Mendiola appropriately asked for, and what he was entitled to, was a brief evidentiary hearing so that the court could determine whether Balderrama or the prosecutor was telling the truth. Balderrama's statement, which Mendiola submitted in support of his request, laid more than an adequate foundation for the hearing. Her statement was given under oath, and it set forth in detail when and why she realized that Mendiola was not the person she had seen shoot Gutierrez, as well as the circumstances and content of the conversation in which she disclosed this information to the prosecutor. Nothing more was required to demonstrate that an evidentiary hearing was necessary.

But rather than devote twenty minutes or so to such a hearing, or to articulate sound reasons why a hearing was unnecessary, the trial judge simply "found" that Balderrama

was lying. The sole piece of evidence that the court actually had before it at that point was Balderrama's sworn statement. Beyond that, it had only an out-of-court verbal assurance from the prosecutor identified in Balderrama's statement denying that there had ever been a conversation in which she told him that Mendiola was not the shooter. G6, G12. That assurance was relayed to the court by the prosecutor's colleague. Nonetheless, the court proceeded to find the hearsay repetition of the prosecutor's denial to be more credible than Balderrama's sworn statement:

> I find there was no violations [*sic*] of the document Brady versus Maryland because I accept [Assistant State's Attorney] Mr. Berlin's word through the representations of [his colleague] Mr. Rogers here in court. Mr. Berlin being an officer of the court that he never had a conversation with Maria Balderamma [*sic*] or she stated that Mr. Mendiola was not the shooter. I find that conversation did not exist; that Maria Balderamma [*sic*] a young lady from the community for whatever motivated her, made in fact a false statement to the defense attorneys in the presence of the court reporter post-trial. That assertion due to the fact I find Mr. Berlin to be a credible outstanding state's attorney. He's not in any way encroached nondisclosure under Brady versus Maryland.

G18-19.

This was an extraordinary turn of events. Without having heard a single witness testify, and based solely on the unsworn assurances of a prosecutor who was not even before the court,[2]

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[2] "Hearsay testimony is presumptively unreliable under the common law because the opposing party has no opportunity to cross-examine and test the declarant's truthfulness under oath before the factfinder." *United States v. Shukri*, 207 F.3d 412, 417 (7th Cir. 2000), citing 5 John H. Wigmore,

the court simply took the prosecution's word and labeled Balderrama a liar. It did not say that her post-trial statement was incredible as a matter of law, it did not say that her statement was immaterial. It simply chose not to believe her, without any of the process that normally attends such credibility determinations.

**3.**

Faced with the blatant impropriety of the trial court's credibility determination, the Illinois Appellate Court felt the need in the first instance to become a factfinder itself. "[A]n appellate court may draw inferences of fact from the record before it," the court proclaimed. *People v. Mendiola,* No. 1-95-2874, Order, at 20 (Ill. App. July 21, 1997) (hereinafter, "Order"), citing ILL. SUP. CT. RULE 366(a)(4)[3] And without further ado—indeed, without any explanation at all—the court simply announced: "We find the content of Maria Balderrama's post-trial statement regarding the conduct of the assistant State's Attorneys in this case to be highly incredible." Order at 20.

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EVIDENCE IN TRIALS AT COMMON LAW § 1368, at 37, § 1420, at 251 (rev. ed. 1974), and MCCORMICK ON EVIDENCE § 245, at 728 (Edward W. Cleary ed., 3d ed. 1984). The prosecutor's out-of-court statement in this case bears none of the indicia of reliability that would overcome this presumption. *See, e.g.,* Fed. R. Evid. 804(b).

[3] The supreme court rule grants a variety of discretionary powers to a reviewing court in Illinois to exercise "on such terms as it deems just," including the authority to "draw inferences of fact." Rule 366(a)(4). Illinois appellate courts resort to this authority when they make a finding that the facts of record virtually compel, *e.g., In re Marriage of Bennett,* 587 N.E.2d 577, 579-81 (Ill. App. 1992), and likewise when they reject a factual assertion that is wholly inconsistent with the record, *e.g., In re Marriage of Johnson,* 565 N.E.2d 162, 163-64 (Ill. App. 1990). Nothing in the rule, however, authorizes a reviewing court to resolve a genuine swearing contest. *See, e.g., Zaderaka v. Illinois Human Rights Com'n,* 545 N.E.2d 684, 688 (Ill. 1989).

The appellate court's finding is even less sound than the trial court's. The trial judge, at least, had heard Balderrama testify at trial and, within the confines of the courtroom, had seen the prosecutors at work. *See ante* at 6-7. The appellate court, by contrast, had only a cold record before it. It had no business making credibility determinations. *See Cabana v. Bullock*, 474 U.S. 376, 388 n.5, 106 S. Ct. 689, 698 n.5 (1986).[4] What the court meant to say, perhaps, when it "found" Balderrama's post-trial statement to be "highly incredible," was that no reasonable finder of fact could believe it—that her statement was incredible as a matter of law. *See, e.g., Anderson v. Bessemer City, N.C.*, 470 U.S. at 575, 105 S. Ct. at 1512; *Kidd v. Illinois State Police*, 167 F.3d 1084, 1095-96 (7th Cir. 1999). That won't fly either. To accuse a prosecutor of misconduct, as Balderrama did, is a grave matter. None of us wants to believe that an officer of the court would instruct a witness to keep exculpatory information to herself. But is it

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[4] Of course I agree that appellate courts have the ability and authority under appropriate circumstances to make factual determinations, *Sumner v. Mata*, 449 U.S. 539, 546-47, 101 S. Ct. 764, 769 (1981) *("Sumner I")*, and that such determinations are presumed to be correct, 28 U.S.C. § 2254(e)(1). *See ante* at 6. Thus, for example, when a state appellate court examines the record and determines that the trial judge did not rely on an impermissible factor in sentencing the defendant, *Wainwright v. Goode*, 464 U.S. 78, 85, 104 S. Ct. 378, 382-83 (1983), that a witness gave an accurate, detailed description of the defendant, *Sumner v. Mata*, 455 U.S. 591, 597, 102 S. Ct. 1303, 1307 (1982) (per curiam) *("Sumner II")*, or that the record reveals or does not reveal racial discrimination in the selection of jurors, *Mitchell v. Rees*, 114 F.3d 571, 576-77 (6th Cir. 1997), *cert. denied*, 522 U.S. 1120, 118 S. Ct. 1062 (1998), we owe that assessment deference. *See Sumner II*, 455 U.S. at 597-98; 102 S. Ct. at 1307; *Sumner I*, 449 U.S. at 546-47, 101 S. Ct. at 769. But the presumption of correctness falls away when the appellate court engages in factfinding without the sort of information or process that render factual assessments reliable. Making a credibility assessment based on a paper record alone is a classic example. *Bullock*, 474 U.S. at 388 n.5, 106 S. Ct. at 698 n5.

beyond the realm of possibility? Regrettably, it is not. *See Lockett v. Blackburn*, 571 F.2d 309 (5th Cir. 1978) (State encouraged and helped confidential informants who witnessed defendant's sale of heroin to undercover agent to leave state before trial, rendering defendant unable to subpoena them); *see also, e.g., United States v. Boyd*, 833 F. Supp. 1277 (N.D. Ill. 1993) (Aspen, J.), *aff'd*, 55 F.3d 239 (7th Cir. 1995); *Walker v. City of New York*, 974 F.2d 293, 294-95 (2d Cir. 1992), *cert. denied*, 507 U.S. 961, 113 S. Ct. 1387 (1993), and *cert. denied*, 507 U.S. 972, 113 S. Ct. 1412 (1993); *Ex Parte Davis*, 957 S.W.2d 9, 10-11 (Tex. Crim. App. 1997), *cert. denied*, 523 U.S. 1023, 118 S. Ct. 1307 (1998); *Commonwealth v. Smith*, 615 A.2d 321, 322-23 (Pa. 1992). Balderrama's allegations are straightforward and plausible, and we are given no other reason to believe that her testimony—if she were ever allowed to give it—*could not* be credited. So far as the record reveals, she is not delusional, she suffers no impairments in her perception, nor is she an incompetent witness—she was, after all, a jewel in the State's case against Mendiola. A factfinder would of course be free not to believe her, but before she can be deemed incredible, her testimony must be *heard*.

Grudgingly indulging the assumption that Balderrama's statement *might* be true, the Illinois appellate court alternatively posited that it was not material in the *Brady* sense—that it was unlikely to have affected the outcome of the trial, in other words. Order at 20-21; *see Strickler*, 119 S. Ct. at 1948, 1952; *Kyles*, 514 U.S. at 434, 115 S. Ct. at 1565-66. For three reasons, each of which again revolves around her credibility, the court was confident that a jury would have discounted Balderrama's allegations: (1) "young Maria's post-trial statement lacks credibility because it seems to result from defense counsel's leading questions"; (2) her statement "was contradicted by nearly every other witness"; and (3) cross-examination by Mendiola's attorney at trial "significantly undercut Maria's ability to inculpate or exculpate *any* suspect."

Order at 21-21 (emphasis in original). The district court thought that this was a reasonable materiality assessment, and sustained the state court judgment on that basis. *Mendiola v. Carter*, No. 98 C 3183, 1998 WL 748276, at *8 (N.D. Ill. Oct. 22) (Kocoras, J.). On closer inspection, however, the appellate court's materiality evaluation turns out to be as flawed as the rest of its analysis.

That Mendiola's lawyers may have asked some leading questions when they elicited Balderrama's post-trial statement is entirely beside the point. Her statement was submitted solely as prima facie proof of the need for a hearing. *See* G8. In that sense, it was no different from an affidavit, which typically is drafted by an attorney in terms favorable to his client. Had the trial court allowed Mendiola to put Balderrama on the witness stand, his attorneys no doubt would have questioned her in an appropriate manner; and the State, I might add, would have enjoyed the opportunity to cross-examine her. But one party cannot conduct a hearing on his own, and so we are left with the record as it is. To discount the evidentiary value of Balderrama's statement because of its form ignores the fact that it is the trial court that is to blame for refusing to hold a hearing, not Mendiola.

To say that Balderrama's statement "was contradicted by nearly every other witness" (Order at 21) is flat-out wrong. What contradicted Balderrama, the court believed, was the testimony of several eyewitnesses that the man who shot Gutierrez "wore a hood." Order at 19. If he was wearing a hood, the appellate court apparently reasoned, Balderrama could not possibly have known that he wore his hair in a ponytail—and the ponytail is one of the reasons she gives for her late realization that Mendiola was not the shooter. C118. Yet, one can wear a hooded sweatshirt or jacket without wearing the hood *up*, and if the shooter's hood was down during any portion of the encounter, it would have been

possible for Balderrama to see a ponytail. In fact, of the five eyewitnesses who testified about the shooting, only one—Carabez—indicated that the assailant raised his hood at the beginning of the encounter. B68, B91. Three others testified that the killer left his hood down until *after* he shot Gutierrez. D150, E38, E65. The fifth—Balderrama—could not recall whether he had a hood or not. B124.

Finally, to suggest that Balderrama's ability to inculpate or exculpate anyone as Gutierrez's assailant had already been cast into doubt at trial ignores the basis for Balderrama's assertion that Mendiola was not the shooter. Balderrama had indeed effectively conceded on cross-examination that she did not get a good look at the killer and did not see his face. B123-24. The two characteristics that in her mind ruled out Mendiola as the assailant, however—his complexion and lack of a ponytail (C118-19)—are not features that require a good look at someone's visage to discern. Nothing in this record gives us reason to doubt that Balderrama in fact saw a ponytail and dark complexion on the assailant. (Carabez, for example, testified that the shooter's complexion was "[b]rownish." B73.) The State itself was content to rely on her description of the shooter to bolster Carabez's identification of Mendiola. F142.

**4.**

My colleagues' own effort to rescue the state courts' finding fares no better and in one important respect, I believe, makes matters worse. Declaring first that there is "[p]lenty of support" in the record for the state courts' assessment of Balderrama's credibility, *ante* at 6, they tick off a list of circumstances which, in their view, suggest that her post-trial statement is false, *ante* at 6-7. None of these factors, however, supports the trial court's decision to dismiss Balderrama as a liar without first holding a hearing. Second, my colleagues make the sweeping declaration that "[d]isbelief of recantations is sensible" because it "promotes truthful testimony during

trial." *Ante* at 7. Maybe, maybe not. But not all recantations are false, and a generalized pronouncement that trial courts are free to disregard any and all recantations as a matter of policy rules out any relief to those convicted on the basis of perjury or otherwise inaccurate testimony.

The fact that the trial court heard Balderrama testify as a witness at trial *(see ante* at 6-7) lends little or no support to the determination that her post-trial statement is incredible. That point would be relevant if Balderrama were attempting to withdraw or change her prior testimony. Had she identified Mendiola as the shooter at trial, for example, the trial court would indeed have had some basis for assessing the veracity of her post-trial assertion that Mendiola was *not* the shooter—having already heard and seen the witness say that X is true under oath, a court has a frame of reference for assessing the credibility of her subsequent statement that X is false. *See, e.g., United States v. Provost,* 969 F.2d 617, 619-20 (8th Cir. 1992), *cert. denied,* 506 U.S. 1056, 113 S. Ct. 986 (1993), cited *ante* at 6-7. Put another way, when a witness wishes to take back what she has already asserted under oath, she has some explaining to do; and if a reasonable explanation is not forthcoming, the court need not let her testify a second time. *See United States v. Stewart,* 198 F.3d 984, 986 (7th Cir. 1999), cited *ante* at 7; *see also Higgins v. Mississippi,* No. 97-3521, 2000 WL 869416, at *3 (7th Cir. June 30). Balderrama's statement is not a true recantation in this sense, however. At trial, Balderrama never implicated Mendiola as the person who shot Gutierrez. Instead, she recounted the sequence of events that culminated in the shooting and gave a vague description of the shooter. In no respect does her post-trial statement conflict with the substance of her testimony. The statement certainly does convey information that Balderrama did not disclose at trial, but in virtually every instance, this was information that she was never asked about at trial. She was never asked, for example, whether the shooter wore his hair in a ponytail. She

was never asked if Mendiola appeared taller, shorter, darker, or lighter than the shooter. She was never asked, in fact, whether she recognized Mendiola at all. Her post-trial statement thus stands in contrast to a true recantation, which often amounts to a confession of perjury. To the extent it requires explanation, she gives it.

My colleagues also suggest that Balderrama's statement "made little sense." *Ante* at 7. "Why would she testify as she did," they ask, "and then sing a different song *immediately* after leaving the stand?" *Id.* (emphasis in original). As I have just explained, however, Balderrama's post-trial statement does not amount to a different song so much as an additional verse. So far as the record discloses, when Balderrama took the witness stand, no one thought that she could or would identify Mendiola as Gutierrez's assailant. She had not picked Mendiola out of the line-up *(see* B116), she had not seen the shooter's face (B115-16), and could only describe the shooter in general terms (B116, B124). Her own realization that she *did* recognize Mendiola (as someone other than the shooter) did not occur until she was on the witness stand. C119. Because no one else was the wiser at that point, she was not asked while on the stand whether she recognized him. The fact that she (allegedly) spoke up immediately after she finished testifying if anything lends credibility to her account of events. Would my colleagues think her allegations more credible if she had waited a month or two (or a year or two) before approaching the prosecutor?

The notion that the trial judge was entitled to credit the prosecutor's unsworn, hearsay denial because prosecutors have "reputational interests in telling the truth" *(ante* at 7) makes insufficient room for the real world. Yes, prosecutors, like other attorneys, have an interest in preserving their credibility; confessing small sins serves that interest. But I hardly think it likely that a prosecutor who actually instructs a witness to

suppress exculpatory information is going to be forthcoming about it, when it is only her word against his. If indeed a prosecutor has engaged in the kind of serious misconduct that Balderrama alleges, arguably it would *not* be in his "reputational interest" to acknowledge the impropriety. Confessing to conduct that amounts to the obstruction of justice will not do much to advance a prosecutor's career. Whatever we might think in the abstract, the important point is that we *know* that some prosecutors do engage in this sort of misconduct *(see, e.g.*, cases cited *supra* at 16), and that they don't always tell the truth about it. Balderrama's allegations are within the realm of possibility. Under the circumstances, the trial judge was obligated to hear both Balderrama and the prosecutor testify before deciding who was telling the truth.

Finally, the suggestion that there are "sensible" policy reasons to disbelieve recantations categorically *(ante* at 7) is bothersome. Recantations *should* be viewed with a healthy dose of skepticism, for all of the reasons my colleagues have cited. But as we know, witnesses don't always wait until after they leave the courtroom to dissemble. Just as a witness may recant her testimony later to appease the defendant and his allies, she may also lie in the first instance, perhaps to appease the prosecution, to protect someone else, or to exculpate herself. In short, the recantation on occasion represents the truth.[5]

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[5] Illinoisans will no doubt recall Cathleen Crowell Webb, who stirred a nationwide controversy in 1985 when she recanted her charge that Gary Dotson had kidnapped and raped her in 1977. Her recantation led the Governor to commute Dotson's sentence, although it did not initially persuade the Illinois courts to vacate his conviction. *See People v. Dotson*, 516 N.E.2d 718 (Ill. App. 1987). Notably, however, the trial judge in *Dotson* at least heard Webb's recantation on the witness stand before rejecting it as incredible. *See id.* at 719. Years later, when DNA testing ruled out Dotson as the source of biological material found on Webb's undergarments, a new trial was ordered and the State dropped the charges against him. *See* Matt O'Connor, *State dismisses Dotson rape case*, CHICAGO TRIBUNE, Aug. 15, 1989, at 1.

Deciding when that is so is by no means an easy task, and when the trial judge has given the witness's change of heart due consideration, his judgment is entitled to our deference. But when a court rejects a plausible recantation out of hand, without any of the process that attends a valid credibility assessment, we owe the court's finding no respect. To sustain such a summary determination, as we do today, is to unnecessarily exalt the sovereignty of state courts over due process and the pursuit of truth.

**5.**

Four state judges, my brothers note in closing, have chosen to disbelieve Balderrama's post-trial statement exonerating Mendiola. *Ante* at 8. With all due respect to my colleagues on the Illinois courts, it would not matter if 100 of them had done so, since not one has actually heard what Balderrama has to say. And given that Balderrama and the prosecutor are the only two people who know whether her allegations are true, Mendiola cannot possibly marshal the clear and convincing evidence needed to show that the state courts' credibility assessment is wrong *(see ante* at 6, 8) unless and until he is given the chance to put Balderrama on the witness stand.

The gravity of the trial court's mistake is demonstrated by the lengths to which the Illinois appellate court, and now this court, have gone to compensate for it. Had the trial judge simply done his job and conducted an evidentiary hearing that would have enabled him to decide whether Balderrama's post-trial statement is truthful, we would not be here today. Instead, we find ourselves struggling to prop up credibility assessments fashioned of smoke and mirrors. It is not our province to second-guess state courts, but neither is it our province to gloss over their mistakes. This case should be remanded to the district court for the evidentiary hearing that the state courts have refused to give Mendiola.

I respectfully dissent.

A true Copy:

Teste:

_____

*Clerk of the United States Court of Appeals for the Seventh Circuit*

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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**No. 98 C 3183**

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**THE UNITED STATES OF AMERICA,**
**ex rel JULIO MENDIOLA, B 67719.**

**Petitioner,**

**vs.**

**LAMARK CARTER, WARDEN,**
**JOLIET CORRECTIONAL CENTER,**

**Respondent.**

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***MEMORANDUM OPINION***

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, this petition is denied.

## BACKGROUND

Petitioner Julio Mendiola is currently incarcerated at the Joliet Correctional Center in Joliet, Illinois. Petitioner was charged with first degree murder for the May 27, 1994, shooting death of Manuel Gutierrez and was convicted after a trial by jury. He was sentenced to 50 years of incarceration in the Illinois Department of Corrections.

Petitioner appealed his conviction to the Illinois Appellate Court, First District, which affirmed his conviction in an unpublished order issued on July 21, 1997 (No. 1-95-

2874). Petitioner sought leave to appeal to the Illinois Supreme Court, but was denied.

In his appeal to the Illinois Appellate Court, Petitioner raised the same four issues he raises with this Court in his petition. Petitioner questions whether 1) the evidence at trial was sufficient to establish Petitioner's guilt beyond a reasonable doubt, 2) the introduction of "gang evidence" at trial violated Petitioner's right to due process under the Fourteenth Amendment, 3) the trial judge erred in denying Petitioner's motion for a new trial based on newly discovered evidence, and 4) prosecutorial misconduct warranted a new trial.

The statement of facts set forth in the appellate court opinion affirming his conviction on direct appeal is not challenged by Petitioner. The appellate court's rendition is therefore presumed correct and serves as the basis for our review. *See Sumner v. Mata,* 449 U.S. 539, 545-46, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (holding that factual determinations made by state courts, whether an appellate or state court, are presumed to be correct under section 2254(d)); *Lewis v. Huch,* 964 F.2d 670, 671 (7th Cir.1992); *Smith v. Fairman,* 862 F.2d 630, 632 (7th Cir.1988), *cert. denied,* 490 U.S. 1008, 109 S.Ct. 1645, 104 L.Ed.2d 160 (1989). Accordingly, we set forth the Appellate Court's account of the facts.

On May 27, 1997, the victim, Manuel Gutierrez, traveled home from work as a passenger in a car driven by his brother at roughly 7:45 p .m. The car proceeded west on 25th Street in Chicago, but stopped at a stop sign near a funeral home at the corner of 25th Street and Sacramento. A wake was being held inside the funeral home for a member of the Latin Kings street gang. Numerous individuals, presumably there to attend the wake, were outside the funeral home when the car

stopped at the stop sign. Upon seeing the car, several people gestured to the car and shouted "Flakes" and "King Love." The crowd of people outside the funeral home began yelling and chased after the car, which sped down 25th Street until it crashed into two other cars at the corner of 25th and Whipple, one block west. Witnesses testified that at least two members of the crowd fired shots at the vehicle as it sped away, testimony corroborated by the discovery of bullet holes and ricochet marks in various areas of the car.

After the crash, the car's four occupants exited the vehicle. Three of them escaped. Manuel Gutierrez attempted to seek shelter in a grocery store at the corner of 25th and Whipple, but was locked out of the store by one of the store's occupants. The people who had given chase to the car then set upon Gutierrez outside the store, where he was kicked, punched, and otherwise beaten. Ultimately, one individual in the crowd shot Gutierrez several times. Gutierrez died at Mount Sinai Hospital a short time later.

In its case-in-chief, the state offered the testimony of Francisco Carabez, who testified that he was walking west on the north side of 25th Street at the time the shooting occurred. He stated that he first saw Mendiola standing outside the funeral home on 25th Street. When the victim's car stopped, Carabez observed the gestures and heard the shouts that the crowd directed toward the car. He heard someone shout "Shoot at him," and watched as Mendiola chased after the car, pulled out a .25 caliber automatic handgun, and began firing the weapon at the automobile, immediately before the car crashed. By the time the victim had exited the car, Carabez had reached the corner of 25th and Whipple, directly across from where the victim was shot. Carabez heard the crowd shout "Shoot him, shoot him" and heard the victim say in Spanish "Por favor, no me pegues. Yo no soy nada," which translates to "Please don't harm me. I am nothing." Carabez

then testified that he witnessed the defendant shoot Gutierrez five or six times. He testified that at the time of the shooting, the shooter wore a blue hooded sweatshirt, dark sweatpants with a Chicago Bulls logo, and dark gym shoes.

After the shooting, Carabez proceeded to the nearby Mario's Ballroom, located at 25th and Kedzie, where he told his friend Angelo Torres what he had seen. Torres and Carabez then drove in Torres' car east on 25th toward the crime scene. The car turned north on Whipple and Carabez spotted Mendiola and identified him as the shooter to Torres. Mendiola was wearing the same clothes that Carabez had seen him in at the time of the shooting.

Carabez then further testified that after pointing out Mendiola to Torres, they returned to the crime scene and spoke with Detective March of the Chicago Police Department. Carabez described the defendant as a male white Hispanic, 20 years old, 5'10" tall, around 140 pounds with short black hair, a mustache, and a dark complexion. He also described Mendiola's attire. A week after the shooting, Carabez identified Mendiola from police photos and in a police line up as the shooter. Carabez also made an in-court identification of Mendiola as the man who shot Gutierrez.

The state also called 12 year-old Maria Balderrama as an occurrence witness. Balderrama testified that she lived at 2515 South Whipple at the time of the shooting. Balderrama's description of the events leading up to the shooting largely mirror those of Carabez. Balderrama's description of the shooter was far more vague. She described the shooter as a man who was "not that tall and not that short," and "not that fat and not that skinny." Balderrama viewed a police line-up but failed to identify any individual as the shooter. She could not recall what the shooter was wearing or if he was wearing a hood. On cross examination,

Balderrama stated that she did not get a good look at the shooter and did not see the shooter's face.

Angelo Torres also testified for the state. His testimony corroborated the latter portion of Carabez's testimony. Torres also testified that he identified Mendiola from police photos and in a police line up as the man pointed out to him by Carabez on the night of the shooting. Torres also made an in-court identification of Mendiola.

Detective Marsh testified that he was the investigating officer in the shooting. He interviewed 15 to 20 witnesses on the night of the shooting, but the only actual witness he could find was Carabez. Based on Carabez's description, police arrested Mendiola one week later. Marsh testified that Mendiola admitted he was a member of the Latin Kings.

Officer Thomas Cepeda testified as an expert in Hispanic gangs in Chicago. He testified that the shooting took place in an area considered the "turf" of a specific group of Latin Kings. Cepeda explained that the term "Flake" refers to one who is not a Latin King, and the term "King Love" operates as a battle cry. Cepeda also testified that he had known Mendiola for six or seven years and had seen Mendiola use Latin King hand gestures and slogans and knew that Mendiola had admitted on several occasions that he was a member of the Latin Kings.

Several witnesses testified for the defense that the shooter was wearing dark pants, was "husky," "chunky," "short," and "dark-complexed." Although some of the witnesses admitted they never saw the shooter's face or did not in fact witness the actual shooting, all of the witnesses stated the Mendiola was not the man who shot Gutierrez.

Francisco Ortega testified as an alibi witness for Mendiola. He said he had known defendant all his life and

had been in Mendiola's car drinking beer with him and Luis Salgado at the time of the shooting.

Mendiola testified on his own behalf. He testified that he was with Ortega and Salgado in his own car drinking beer at the time of the shooting. Defendant admitted that at the time of his arrest he gave the officers conflicting accounts of his whereabouts at the time of the shooting. He said that he had confused his Friday night activities with his Saturday night activities. He also denied that he was ever a member of the Latin Kings.

In rebuttal, the state called Officers Cepeda and Marsh again and also Officer Richard Lara. Cepeda testified that the crown tatoo on Mendiola's shoulder was an insignia of the Latin Kings. Cepeda also testified that in a 1990 booking photo, Mendiola's hands were positioned in a hand gesture employed by the Latin Kings.

The jury deliberated for a little over three hours before convicting Mendiola on first degree murder charges on May 19, 1995.

On the day of sentencing, Mendiola filed a motion for a new trial, based mainly on newly discovered evidence. According to Mendiola's motion, prosecution witness Maria Balderrama later alleged that, as she testified at trial, she realized that defendant was not the man who shot Gutierrez. Further, Balderrama alleged that she told one of the assistant State's Attorneys that defendant was not the man who killed the victim. Balderrama alleged that the prosecutor made no response to her revelation, although he did inform her not to tell defense counsel. The motion for new trial also argued that a newly discovered eyewitness, Jose Rocha, would offer new evidence tending to exculpate Mendiola. The trial court denied Mendiola's motion without holding an evidentiary hearing and sentenced him to 50 year incarceration.

Petitioner has exhausted his state court remedies and had not procedurally defaulted any of the issues raised in his petition, with the exception of one issue in his second claim, as articulated below. *See Boerckel v. O'Sullivan,* 135 F.3d 1194 (7th Cir.1997).

## LEGAL STANDARD

Mendiola's petition, which was filed on May 22, 1998, is governed by the amendments to 28 U.S.C. § 2254. Subsection (d) of section 2254 governs the consideration of any claim adjudicated by a state court on its merits. *See Lindh v. Murphy,* 96 F.3d 856, 868-71 (7th Cir.1996) (en banc), *rev'd on other grounds,* 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Under § 2254(d)(1), habeas relief may be awarded only if the state court's adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. *See id.* Under subsection (d)(2), habeas relief is possible only if the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" in the state court. *See id.* (citing § 2254(d)(2)). The "unreasonable application" exception of § 2254(d)(1) applies to mixed questions of law and fact, and thus where the state court offers "a responsible, thoughtful answer" after "full opportunity to litigate" the question, a federal court on habeas review must accept that answer as "adequate to support the judgement." *Id.* at 871. The Court will thus consider each of Mendiola's claims under these standards.

## DISCUSSION

Claim 1 – Insufficiency of Evidence to Establish Guilt Beyond a Reasonable Doubt.

Petitioner claims that his conviction is a denial of due process because he was convicted on insufficient evidence. No denial of due process will be found when "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979).

The Court finds this claim baseless. Petitioner argues that no rational trier of fact could have found Mendiola guilty because the single identification witness, Francisco Carabez, was contradicted by alibi witnesses and eyewitnesses to the crime. In this case, the jury obviously believed Carabez's testimony and discounted the testimony of the other witnesses, including the alibi witnesses. One credible witness is all that is required to support a verdict of guilt by a jury. *See Ticey v. Peters* 8 F.3d 498, 503 (7th Cir.1993) (citing *Wandick v. Chrans,* 869 F.2d 1084 (7th Cir.1989)).

Petitioner has attacked the reliability of Carabez's identification of Mendiola based on Mendiola's opportunity to view the crime, his lack of attention, his prior description of the crime, his level of certainty in identifying Mendiola, and the length of time between the crime and when Carabez identified Mendiola. *See, e.g., Neil v. Bigger,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) (adopting a five part test in assessing the reliability of out of court identification procedures). Carabez's identification was not so incredible as to amount to a deprivation of due process. Carabez watched the crime from across the street. Even though Carabez was a bystander unacquainted with the victim, the shocking nature

of what was going on around him made it highly likely that his attention would be directed at the crime scene. Carabez's description of the perpetrator shortly after the occurrence of the crime was highly accurate. Carabez described the perpetrator as a 20 year-old white Hispanic, 5'10", and 140 pounds. In fact, Mendiola is 23 years old, 5' 11 ½ ", and 180 pounds.

Although no other witnesses identified Mendiola, the descriptions given by Carabez were not without support. As the Illinois Appellate Court noted, "His testimony as to the sequence of events that evening was corroborated by the testimony of Maria Balderrama and Angelo Torres. Even the defense witnesses corroborated the detailed description Mr. Carabez gave to police regarding the clothes worn by the assailant. Finally, the physical evidence recovered by the police ... also tended to bolster Mr. Carabez's account of the crime." *Illinois v. Mendiola,* No. 95CR-15872 (1st Dist.Ill.1997) (hereinafter "Appeals Court"), at 14.

The jury apparently thought Mendiola and his friends concocted an alibi. They found Carabez credible. We conclude that the Illinois Appellate Court was not unreasonable in finding that evidence supported the jury's finding of guilt beyond a reasonable doubt.

Claim 2 – Introduction of Gang Evidence and Petitioner's Right to Due Process

Petitioner has claimed that the "extraordinary, excessive, ceaseless introduction of gang evidence" was fundamentally unfair and denied Mendiola due process under the Fourteenth Amendment. Petitioner's Memorandum at 7. This Court disagrees.

Because the admissibility of evidence is generally a matter of state law, "a federal court can issue a writ of habeas

corpus on the basis of a state court evidentiary ruling only when that ruling violated the defendant's right to due process by denying him a fundamentally fair trial." *Milone v. Camp*, 22 F.3d 693, 702 (1994) (citing *Haas v. Abrahamson*, 910 F.2d 384, 389 (7th Cir.1990)).

Petitioner has objected to the volume of gang evidence the trial court admitted in evidence. He objects to the expert testimony given by Chicago Police Officer Cepeda who testified at length about gangs in the area and about his knowledge of Mendiola. Petitioner contends that Cepeda should not have been allowed to give expert testimony because his testimony was on matters "not beyond the knowledge of the jurors" and was purely prejudicial. Petitioner's Memorandum at 9. Cepeda's testimony that Mendiola had been under police surveillance from 1990 to the date of the trial was prejudicial to the point of denying Mendiola a fundamentally fair trial.

Mendiola and each defense alibi witness were cross-examined on their gang membership. After Mendiola denied on the stand his gang involvement, the state introduced evidence, based in large part on the expert testimony of Cepeda, that Mendiola was a member of the Latin Kings. Petitioner also objects to Cepeda's qualifications as an expert.

Federal courts have often allowed the admission of gang evidence to prove motive, *see United States v. Butler*, 71 F.3d 243, 251 (7th Cir.1995)(collecting cases), or bias, *see United States v. Lewis*, 910 F.2d 1367, 1372 (7th Cir.1990) ("membership in the prison gang was sufficiently probative of ... possible bias towards respondent to warrant its admission into evidence"), or other matters.

In reviewing the conviction, the Illinois Appellate Court determined that the evidence was admissible under Illinois law to "prove motive for an otherwise inexplicable act."

Appeals Court at 15. The Appellate Court noted that the admission of the evidence was allowed only after a motion in limine where the defense had a full opportunity to argue its prejudicial nature to the trial court. Appeals Court at 15. Moreover, the trial court gave a limiting instruction that Cepeda's testimony was to be considered only for the purpose of establishing motive. Appeals Court at 16.

The prosecution's rebuttal evidence of the gang affiliations of Mendiola and other defense witnesses was allowed because it was "particularly relevant" because it "indicated that the assailant killed Manuel Gutierrez specifically because the victim was not a Latin King." Appeals Court at 16. Moreover, the evidence was relevant to the credibility of Mendiola and his witnesses who the state showed were all members of the Latin Kings. Appeals Court at 16-17.

In light of these findings by the Illinois Appellate Court, there is no basis to conclude that introduction of gang evidence was anything other than proper, and did not deny Mendiola due process. The evidence was used for proper purposes and was highly relevant.

Petitioner also contends that the prosecutor's closing argument was unsupported by evidence and so prejudicial as to amount to a denial of due process. The Illinois Appellate Court found that Mendiola did not properly preserve this issue for its review and did not consider it on appeal. Appeals Court at 17. This Court will therefore not address this argument in Mendiola's habeas petition because this ground was procedurally defaulted in state court. *See Boerckel v. O'Sullivan,* 135 F.3d 1194 (7th Cir.1998) (citing *Coleman v. Thompson,* 501 U.S. 722, 729-30, 111 S.Ct. 2546, 2554, 115 L.Ed.2d 640 (1991)). Although the state in its response to Mendiola's habeas petition failed to raise the issue of

procedural default, this Court does not believe that it intended to waive the default. *See Kurzawa v. Jordan,* 146 F.3d 435, 440 ("If the State does not explicitly or implicitly forego the waiver defense, we may make sua sponte inquiry into whether a procedural default is manifest and decide whether comity and judicial efficiency make it appropriate to consider the merits of the petitioners arguments." (internal quotation marks omitted)). Because of petitioner's procedural default, there is no appeals record for this claim, not even with the intermediate appellate court in Illinois. This Court therefore declines to consider the merits of this claim.

Even after a procedural default, a habeas court may consider the merits of petitioner's claim if the petitioner demonstrates "both good cause for the failure to raise the claims on direct appeal and actual prejudice from the failure to raise those claims, or if a refusal to consider the issue would lead to a fundamental miscarriage of justice." *Prewitt v. United States,* 83 F.3d 812, 816 (7th Cir.1996). Petitioner has failed to demonstrate good cause for not preserving the issue for appeal. He has not even taken issue with the Illinois Appellate Court's conclusion that he failed to preserve his right to appeal that issue. This Court further does not believe that a fundamental miscarriage of justice would result from failing to consider the merits of the claim.

For these reasons, Petitioner's second claim is rejected.

Claim 3 – Newly Discovered Evidence

According to Petitioner, after Balderrama had testified, Balderrama told an Assistant State's Attorney that Mendiola had not committed the murder. After trial but before sentencing, Rocha indicated to the defense that he was standing ten feet away from the entire incident and he saw a 14 or 15 year old shoot Gutierrez. Petitioner argues that he

should be granted a new trial based on their statements. This Court does not agree.

Because newly discoverable evidence relating only to the petitioner's guilt or innocence is generally not reviewable on a habeas petition, *see Herrera v. Collins,* 506 U.S. 390, 113 S.Ct. 853, 860, 122 L.Ed.2d 203 (1993), federal courts may examine newly discovered evidence only to the extent that it relates to the petitioner's underlying constitutional claims. *See Milone v. Camp,* 22 F.3d 693, 701 (7th Cir.1994). The petitioner must also show that the newly discovered evidence would probably have resulted in an acquittal. *See Coogan v. McCaughtry,* 958 F.2d 793, 802 (7th Cir.1992).

As a preliminary matter, this evidence does not qualify as "newly discovered." Newly discovered evidence is evidence which "the petitioner reasonably either did not know about ... or could not have presented ... at an earlier proceeding." *United States ex rel. Shore v. O'Leary,* 833 F.2d 663, 669 (7th Cir.1987). Here, Mendiola presented that evidence to the state trial court with his motion for a new trial. The Illinois Appellate Court reviewed that determination and concluded that the proposed testimony of Jose Rocha and Maria Balderrama failed to meet to requirements to warrant a new trial. Appeals Court at 17-18.

In any case, this Court cannot conclude that the testimony by Rocha and Balderrama would probably have resulted in an acquittal. The Illinois Appellate Court found Rocha's testimony to be cumulative when considering the numerous defense witnesses the jury did not believe who testified the shooter was younger than Mendiola. Appeals Court at 18. Balderrama's new statements were the result, according to the Appellate Court, of leading statements by the defense. Appeals Court at 19. Moreover, her description of the shooter as a man with a pony tail was contradicted by

virtually every other witness who all testified that the shooter wore a hood. Appeals Court at 19.

These revelations are hardly sufficient to establish that newly discovered evidence would have resulted in an acquittal. Mendiola's third claim is therefore rejected.

Claim 4 – Prosecutorial Misconduct

Mendiola's fourth claim involves a conversation Balderrama allegedly had with the State's Attorney. According to Balderrama, after testifying, she went up to the prosecutor and told him that Mendiola was not the shooter. In response, the prosecutor told her that she should not tell that to Mendiola's attorneys or Mendiola's parents. The prosecutor also failed to disclose this new information to the defense. This Court does not believe that even if Balderrama had this conversation with the prosecutor, failure to reveal this evidence to the defense would be a violation of due process.

A prosecutor's duty to turn over exculpatory evidence is clearly established. *See Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Whether such failure to disclose gives rise to a violation of due process depends on the materiality of the disclosed information.

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

*Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995)(quoting *United States v. Bagley,* 473 U.S. 667, 678, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985)).

It is worth noting as a preliminary matter that the Appellate Court raised serious questions as to whether the conversation ever took place. Appeals Court at 20. Even if it did, the new evidence given to the prosecutor--that Balderrama did not think Mendiola was the shooter--was not material.

The Illinois Appellate Court found that the statements allegedly made by Balderrama to the prosecutor were contradicted by other witnesses with respect to the description of the shooter. Appeals Court at 20-21. Moreover, after the defendant's cross of Balderrama, her ability to identify the shooter was highly questionable. Appeals Court at 20. Based on the foregoing, the Illinois Appellate Court determined that the evidence was not material for *Brady* purposed.

We cannot conclude that the Illinois Appellate Court's determination that the *Brady* evidence was not "material" was an unreasonable application of federal law. Petitioner's fourth and final claim is therefore denied.

## CONCLUSION

For the foregoing reasons, Julio Mendiola's petition for a writ of habeas corpus is DENIED.

s/ Charles P. Kocoras
Charles P. Kocoras
United States District Judge

Dated: October 21, 1998

**UNITED STATES DISTRICT COURT**
**Northern District of Illinois**
**Eastern Division**

Case Number: 98 C 3183

**USA ex rel JULIO MENDIOLA**

**v.**

**LaMark Carter**

**JUDGMENT IN A CIVIL CASE**

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Petitioner's petition for a writ of habeas corpus is denied. All matters in controversy having been resolved, final judgment is entered in favor of the Respondent and against Petitioner.

Michael W. Dobbins, Clerk of Court

s/ Stephen C. Tokoph

Stephen C. Tokoph, Deputy Clerk

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

No. 98 C 3183
Judge Charles Kocoras
DOCKETED NOV 19 1998

**THE UNITED STATES OF AMERICA,**
**ex rel JULIO MENDIOLA, B 67719,**

**Petitioner,**

**vs.**

**LAMARK CARTER, WARDEN,**
**JOLIET CORRECTIONAL CENTER,**

**Respondent.**

## *NOTICE OF APPEAL*

Notice is hereby given that Julio Mendiola, the petitioner in the above-captioned case, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment (Memorandum Opinion) entered in this action on the 21st day of October, 1998.

Respectfully submitted,

s/ David S. Meja
David S. Meja, attorney for Julio Mendiola

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**No. 1-95-2874**

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**IN THE**
**APPELLATE COURT OF ILLINOIS**
**FIRST JUDICIAL DISTRICT**

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 95CR-15872 |
| JULIO MENDIOLA, | ) | HONORABLE JOHN E. MORRISSEY, |
| Defendant-Appellant. | ) | JUDGE PRESIDING. |

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**ORDER**

On May 27, 1994, Manuel Gutierrez was shot and killed. Nearly one year later, a jury convicted defendant, Julio Mendiola, of first degree murder for the shooting death of Gutierrez. The trial court sentenced him to a term of 50 years imprisonment. Defendant appeals his conviction, contending: (1) the evidence offered by the prosecution failed to prove defendant guilty beyond a reasonable doubt, because only one eyewitness identified defendant as the shooter; (2) the prosecution committed prejudicial error by introducing evidence of defendant's gang membership during its case-in-chief, its rebuttal case and in closing argument, and that the introduction of this evidence denied defendant a fair trial; (3) newly discovered evidence entitled defendant to a post-trial evidentiary hearing and a new trial; and (4) the prosecution's

alleged suppression of exculpatory evidence denied the defendant a fair trial. We affirm defendant's conviction.

## I. FACTS OF THE CASE

On May 27, 1994, the victim, Manuel Gutierrez, travelled home from work as a passenger in a car driven by his brother, Lesandro, at roughly 7:45 p.m. The car, a white four-door Chevrolet, proceeded westbound on 25th Street in Chicago, but stopped at a stop sign near a funeral home at the corner of 25th Street and Sacramento. Inside the funeral home, a wake was being held for a member of the Latin Kings street gang. Outside the funeral home, a number of people, presumably attendees at the wake, milled about on either side of 25th Street. Upon seeing the Chevrolet, several of the wake-goers began gesturing toward the car, shouting "Flakes" and "King Love." The occupants of the car grew alarmed at this queer behavior and attempted to speed away. The mob of people milling about on 25th Street then began yelling and chased after the Chevrolet, which ultimately crashed into two other cars at the corner of 25th Street and Whipple, one block west. Witnesses testified that at least two members of the mob fired shots at the vehicle as it sped away from the funeral home, and this was corroborated by the discovery of bullet holes and ricochet marks in various areas of the Chevrolet.

After the crash at 25th and Whipple, the car's four passengers exited the vehicle. Three of the men escaped: the victim's two brothers, Julio and Lesandro Gutierrez, as well as a third man. Manuel Gutierrez attempted to seek shelter in a grocery store at the corner of 25th and Whipple; a person inside the store, however, locked him out. The mob which had been giving chase then set upon Manuel Gutierrez outside the grocery store. Members of that mob kicked, punched, and otherwise beat the victim. Finally, one person in the mob shot

Manuel Gutierrez several times, causing his death at Mount Sinai Hospital shortly thereafter.

In its case-in-chief, the state offered the testimony of Francisco Carabez, who testified that he was walking west on the north side of 25th Street at the time the shooting occurred. He stated that he first saw defendant standing outside the funeral home on 25th Street. When the victim's car stopped, Mr. Carabez observed the gestures and heard the shouts that the mob directed toward the car. He heard someone shout "Shoot at him," and watched as defendant chased after the car, pulled out a .25-caliber automatic handgun, and began firing the weapon at the automobile. The Chevrolet then crashed. By the time the victim exited the crashed automobile, Mr. Carabez had reached the corner of 25th Street and Whipple, directly across the street from where the shooting occurred. He watched as the crowd attacked Manuel Gutierrez and heard people in the crowd say, "Shoot him, shoot him, shoot him." Mr. Carabez also heard the victim say in Spanish, "Por favor no me pegues. Yo no soy nada." This phrase, roughly translated, means, "Please don't harm me. I'm not nothing." Carabez then testified that he witnessed the defendant shoot Manuel Gutierrez five to six times. Carabez testified that at the time of the shooting, defendant wore a blue hooded sweatshirt, dark sweatpants with a Chicago Bulls logo, and dark gym shoes.

After the shooting, Carabez proceeded to nearby Mario's Ballroom, located at 25th and Kedzie. There he told his friend, Angelo Torres, what he had witnessed. Messrs. Carabez and Torres then drove east on 25th Street toward the crime scene in Torres' car. The car turned north on Whipple, and Carabez spotted the defendant (who was walking northbound on Whipple) and identified defendant as the shooter to Mr. Torres. Defendant was wearing the same clothes that Carabez had seen him in at the time of the shooting. Carabez identified defendant to Torres approximately ten minutes after the shooting.

Mr. Carabez further testified that, after he pointed defendant out to Mr. Torres on Whipple Street, he returned to the crime scene and spoke with Detective March of the Chicago Police Department. Carabez described the defendant as a male white Hispanic, 20 years old, 5'10" tall, around 140 pounds with short black hair, a mustache, and a dark complexion. He also described defendant's attire. A week after the shooting, Carabez identified defendant from police photos and in a police line up as the shooter. Finally, Mr. Carabez made an in-court identification of defendant as the man who shot Manuel Gutierrez.

The state also called 12 year-old Maria Balderrama as an occurrence witness. She testified that she lived at 2515 South Whipple, and that she was playing on the corner of 25th and Whipple at the time of the shooting. Maria's description of the events leading up to the shooting largely mirrored the description given by Francisco Carabez. However, Maria limited her description of the shooter to that of a man who was "not that tall and not that short," and "not that fat and not that skinny." Maria also viewed a police line up, but failed to identify any individual as the shooter. Maria could not remember what the shooter was wearing, or if he was wearing a hood. On cross-examination, defense counsel elicited testimony from Maria in which she stated that she did not get a good look at the shooter, and that she did not see the shooter's face at all.

Angelo Torres also testified for the state. His testimony corroborated the latter portion of the testimony of Francisco Carabez: Torres drove with Carabez toward the crime scene, turned north on Whipple, and then Carabez identified defendant as the shooter to Torres. Mr. Torres also testified that a week after the shooting, he identified defendant from police photos and in a police line up as the man Carabez pointed out to him on the night of the shooting. Finally, Torres also made an in-

court identification of defendant as the man Carabez identified as the shooter.

Several Chicago Police officers testified at defendant's trial. Detective David March testified that he was the investigating officer on this case. On the night of the shooting, he interviewed between 15 and 20 witnesses; however, the only eyewitness to the actual shooting he could find was Francisco Carabez. Based upon Mr. Carabez's description, the police arrested defendant one week later. Detective March testified that defendant admitted he was a Latin King. Detective March was present when Mr. Carabez and Mr. Torres each identified defendant in a police line up. On that date Maria Balderrama also viewed the same police line up, but she could not identify any individual as the shooter. Detective March testified that Maria appeared very scared and very hesitant to even view the line up until March assured her that no one in the line up could see her. On cross-examination, Detective March admitted that there may have been one potential eyewitness--Romanita Reyes--whose name appeared on the original police report with whom Detective March did not speak.

Officer John Naujokas testified as a forensic investigator. Naujokas recovered six .25-caliber shell casing from the scene of the crime. These shell casings were introduced into evidence against the defendant. Ernest Warner of the Chicago Police Department's Crime Lab testified as a firearms expert. Mr. Warner testified that the six .25-caliber casings were all fired from the same gun. Warner also testified that the bullets he received from the Cook County Medical Examiner's Office--bullets extracted from the victim's body--were .25-caliber bullets.

Officer Thomas Cepeda testified as an expert on Hispanic gangs in the City of Chicago. He testified that the shooting took place in an area considered the "turf" of the 23rd and Whipple

Kings, a specific strain of Latin Kings. Cepeda explained that the term "Flake" refers to one who is not a Latin King, and that the phrase "King Love" operates as a battle cry, utilized, for example, when the gang engages in drive-by shootings. Latin Kings often use these slogans as primitive identification devices, where the listener responds by indicating whether he or she is a friend or foe. Hand gestures symbolizing a crown are also employed to the same effect. Cepeda also testified that he had known defendant for six or seven years, had witnessed him utilize the hand gestures and slogans indicative of membership in the Latin Kings, and believed defendant to be a member of the Latin Kings gang. Cepeda stated that defendant admitted to membership in the Latin Kings on several occasions.

Several witnesses testified for the defense. These witnesses, with minimal variation, each described the shooter as wearing a dark hooded sweatshirt with dark pants, "young," "husky," "chunky," "short," and "dark-complexed" [sic]. Some of the defense witnesses, such as Roberta Garcia Gonzalez and Ramonita Reyes, testified that they never saw the shooter's face. Defense witnesses Pedro Morales and Ricardo DeSantiago admitted that they never saw the actual shooting. All of the witnesses offered by the defense stated that Julio Mendiola was not the man who shot the victim. However, the prosecution revealed at trial that none of these alleged eyewitnesses ever contacted Chicago Police subsequent to the day the shooting occurred. Witnesses Pedro Morales, Richard DeSantiago, and Alvaro Ruiz each testified that they were not members of the Latin Kings.

Francisco Ortega also testified for the defense. Mr. Ortega acknowledged that he had known defendant all his life. On the afternoon of the shooting, Ortega attended the wake at the funeral home located at 25th and Sacramento. Around six o'clock that evening, Ortega left the funeral home and happened to meet defendant at a nearby gas station. Ortega

testified that he then drove with defendant in defendant's car to the home of Luis Salgado, another friend of defendant's. Ortega stated that while he waited in defendant's car, defendant entered the home. At roughly 7:00 p.m., defendant reemerged from the home with Luis, at which point, according to Ortega, the three men sat in defendant's car drinking beer. This continued until 8:30 p.m., when defendant returned Ortega to the gas station where they met earlier that evening. Defendant then left to pick up his girlfriend. Ortega also testified that he never joined the Latin Kings.

Julio Mendiola, the defendant, testified on his own behalf. Defendant's testimony essentially corroborated that of Mr. Ortega, which in turn placed before the jury defendant's alibi: that at the time of the murder, he was drinking beer in his car with Ortega and Luis Salgado. Salgado never testified; defendant's girlfriend, with whom he allegedly met later that evening, never testified. On cross-examination, defendant admitted that, at the time of his arrest, he gave the investigating officers conflicting accounts of his whereabouts on the night of the shooting. Defendant attributed these conflicting accounts to the fact that he had inadvertently confused his Friday night activities (the night of the victim's murder) with his Saturday night activities. Defendant denied, during both direct and cross-examination, that he was ever a member of the Latin Kings.

In rebuttal, the state called Officer Cepeda once again. Cepeda explained that the crown tatoo on defendant's left shoulder was an insignia of the Latin Kings. Cepeda also explained that, in a 1990 booking photo, defendant's hands were positioned in a hand gesture employed by the Kings. Cepeda further stated that defense witnesses Francisco Ortega and Ricardo DeSantiago had each admitted to Cepeda that they belonged to the Latin Kings. Chicago Police Officer William Soraghan also testified on rebuttal, and he stated that both

defendant and Francisco Ortega had previously admitted to him that they were Latin Kings.

The State then re-called Detective March to testify. March testified as to the inconsistencies in the alibi defendant gave police on the night he was arrested--June 3, 1994, eight days after the murder of Manuel Gutierrez. March also testified that defendant identified himself as a Latin King the night he was arrested. Finally, Chicago Police Officer Richard Lara testified that on May 17, 1995, he stopped defense witness Alvaro Ruiz, who also identified himself as a Latin King.

On May 19, 1995, the jury deliberated for a little over three hours before it convicted defendant of first degree murder.

On the day of sentencing, June 26, 1995, defendant filed a motion for a new trial. Defendant based much of his motion on alleged "newly discovered evidence." According to defendant's motion, prosecution witness Maria Balderrama later alleged that, as she testified at trial, she realized that defendant was not the man who shot Manuel Gutierrez. Further, Maria alleged that she told one of the assistant State's Attorneys that defendant was not the man who killed the victim; Maria alleged that the prosecutor made no response to her revelation, although he did inform her not to tell defense counsel. Defendant attached a court reported statement--dated June 2, 1995--given by Maria Balderrama in support of her allegations. The motion for new trial also argued that a newly discovered eyewitness, Jose Rocha, would offer new evidence tending to exculpate defendant. Defendant attached a court reported statement of Jose Rocha to the motion as well. The trial court denied defendant's motion without holding an evidentiary hearing, and imposed a sentence of 50 years. Defendant now brings this appeal.

## II. ANALYSIS

We first consider defendant's assertion that the prosecution, by relying upon the testimony of a single eyewitness, failed to prove defendant guilty beyond a reasonable doubt. When the sufficiency of the evidence is challenged, a reviewing court must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Montefolka,* 287 Ill. App. 3d 199, 206, ___ N.E.2d ___, ___ (1997). In making this determination, an appellate court must view the evidence in the light most favorable to the prosecution. *People v. Young,* 128 Ill. 2d 1, 49, 538 N.E.2d 461, 472 (1989); *People v. Holmes,* 141 Ill. 2d 204, 565 N.E.2d 950 (1990). This legal conclusion preserves the factfinder's role as weigher of the evidence. *Young,* 128 Ill. 2d at 49, 565 N.E.2d at 473 (citing *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

Considering the evidence in the light most favorable to the prosecution, we find that the eyewitness testimony of Francisco Carabez sufficiently supported the jury's verdict of guilt beyond a reasonable doubt. A single witness' identification of an accused may support a conviction even in the face of contradictory alibi testimony, so long as the witness viewed the accused under circumstances permitting a positive identification. *People v. Slim,* 127 Ill. 2d 302, 537 N.E.2d 317 (1989), *rev'g* 164 Ill. App. 3d 519, 518 N.E.2d 154 (1987). In *Slim,* the court enumerated several circumstances to consider in evaluating an identification, including: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness; (5) the length of time between the crime and the identification. *Slim,* 127 Ill. 2d at 307-308, 537 N.E.2d at 319 (relying upon *Neil v. Biggers,* 409 U.S. 188, 93

S. Ct. 375, 34 L. Ed. 2d 401 (1972), *rev'g in part* 418 F.2d 91 (6th Cir. 1971)).

Initially, we cannot find fault with Mr. Carabez's opportunity to view the defendant at the time he committed the crime. Carabez testified that he saw defendant standing in front of the funeral home at 25th Street and Sacramento, and his testimony indicates that he continued observing the events of the crime as they proceeded to unfold along 25th Street down to Whipple. Furthermore, we do not question the degree of attention that Mr. Carabez paid to this occurrence, as this crime was by all accounts shocking in its senselessness. The description given by Mr. Carabez surpassed all defense witnesses in its clarity and detail, and this detail suggests that Mr. Carabez observed the crime with attentiveness.

Defendant particularly challenges the accuracy of Mr. Carabez's prior description of the assailant: a Hispanic male, 20 years old, 5'10" tall, around 140 pounds with short black hair, a mustache, and a dark complexion. At the time of his arrest, defendant was a Hispanic male, 23 years old, 5'11$^1/_2$" tall, around 180 pounds with short black hair and a mustache. The only significant discrepancy, then, is a difference of 40 pounds. Discrepancies as to height and weight alone have not been considered decisive on review, as few people are capable of making accurate estimations of those characteristics. *Slim,* 127 Ill. 2d at 312, 537 N.E.2d at 321 (discussing cases). As for the fact that defense witnesses described the shooter as much shorter, we believe that this was a credibility issue which the jury resolved in favor of the prosecution. *Holmes,* 141 Ill. 2d at 240, 565 N.E.2d at 966 ("Generally, discrepancies as to physical characteristics are not fatal, but simply affect the weight to be given identification testimony"). Moreover, virtually all of the witnesses corroborated Mr. Carabez's testimony regarding the attire of the shooter.

Because we find nothing in the trial record that casts doubt upon the certainty with which Mr. Carabez identified defendant, and because Mr. Carabez identified defendant from photos and a police line up only eight days after the crime, we hold that his identification of defendant as the shooter satisfies the considerations set down in *Slim.* Furthermore, we remain unpersuaded by defendant's contention that the eyewitness testimony of Mr. Carabez cannot withstand the "unrebutted" alibi testimony of Ricardo DeSantiago, Francisco Ortega and Julio Mendiola. The weight afforded alibi testimony is a question of credibility, and such questions are to be determined by the finder of fact. *People v. McCartney,* 206 Ill. App. 3d 50, 57-58, 563 N.E.2d 1061, 1066 (1990). The jury weighed the testimony and presumably found Mr. Carabez the more credible witness.

Accordingly, we reject defendant's first argument, that the testimony of Mr. Carabez was insufficient to prove defendant guilty beyond a reasonable doubt. His testimony as to the sequence of events that evening was corroborated by the testimony of Maria Balderrama and Angelo Torres. Even the defense witnesses corroborated the detailed description Mr. Carabez gave to police regarding the clothes worn by the assailant. Finally, the physical evidence recovered by the police (the six .25-caliber shell casings) also tended to bolster Mr. Carabez's account of the crime. Viewing the evidence in the light most favorable to the State, we feel that the jury did not exceed the boundaries of rational thought when it found defendant guilty beyond a reasonable doubt.

Defendant's second argument asserts that the State's "relentless - ceaseless introduction of revolting gang evidence" unduly prejudiced the jury against defendant and thus deprived him of a fair trial. Defendant complains that the prosecution introduced such evidence in its case-in-chief and its rebuttal

case, and objects that the prosecution impermissibly referred to this gang evidence in its closing argument.

While a strong prejudice exists against members of street gangs, evidence of an accused's gang membership need not be excluded if the trial court determines that such evidence is relevant and admissible. *People v. Askew,* 273 Ill.App.3d 798, 808, 652 N.E.2d 1041, 1049 (1995). A reviewing court shall not overturn a decision to admit gang evidence in the absence of a clear abuse of the trial court's discretion. *People v. Colon,* 162 Ill. 2d 23, 30, 642 N.E.2d 118, 121 (1994), *rev'g* 249 Ill. App. 3d 141, 618 N.E.2d 1067 (1993).

In this case, the prosecution filed a motion *in limine* to allow the introduction of evidence that this shooting was gang-motivated. Evidence indicating that the defendant was a member of a gang is admissible to provide motive for an otherwise inexplicable act. *People v. Resendez,* 273 Ill. App. 3d 751, 759, 652, N.E.2d 1357, 1361 (1995), citing *People v. Smith,* 141 Ill. 2d 40, 565 N.E.2d 900 (1990). This crime was an inexplicable act. The gang evidence introduced by the State was relevant to explain the slogans "King Love" and "Flake," to explain the hand gestures used by the mob before it set upon the victim, and to put the final words of Manuel Gutierrez in an appropriate context. We note that the defense had the opportunity to argue this issue in response to the prosecution's motion *in limine.* Additionally, after Officer Cepeda's direct examination, the trial court specifically instructed the jury that Cepeda's testimony was to be considered only for the purpose of establishing motive. We cannot say that the trial court abused its discretion in allowing the State to introduce gang evidence in its case in chief. See generally *Colon,* 162 Ill. 2d at 30, 642 N.E.2d at 121 (trial court did not abuse its discretion where it admitted gang evidence to show motive after considering defendant's motion *in limine*).

We also find that the trial court properly admitted the State's rebuttal evidence regarding the gang affiliations of defendant and several of the defense witnesses. Evidence of gang affiliation, where clearly relevant to the reliability of the testimony of a witness, should be allowed. *People v. Gonzalez,* 104 Ill. 2d 332, 338, 472 N.E.2d 417, 420 (1984); *People v. Miller,* 101 Ill. App. 3d 1029, 1035, 428 N.E.2d 1038, 1043. *Cf. People v. Harris,* 262 Ill. App. 3d 35, 47. 634 N.E.2d 318, 327 (1994) (if gang activity is only marginally relevant to crime, probative value of evidence of witness' gang membership does not outweigh its prejudicial effect). The evidence in this case indicated that the assailant killed Manuel Gutierrez specifically because the victim was not a Latin King. In light of this fact, gang evidence was particularly relevant in this case. The prosecution presented rebuttal evidence that defendant and several defense witnesses belonged to the Latin Kings. This evidence was relevant to the credibility of those witnesses, and the trial court acted within its discretion by allowing its introduction.

Defendant further contends that the prosecution committed prejudicial error in its closing argument by suggesting that Maria Balderrama refused to identify defendant because she feared reprisal from the Latin Kings. Defendant asserts that the evidence did not support this argument. The State responds that defendant waived this claim since defense counsel failed to object at the time these remarks were made and counsel failed to include this issue in the motion for new trial. Defendant did not respond to the State's waiver argument in his reply brief. Accordingly, we hold that defendant did not properly preserve this issue for our review. *Resendez,* 273 Ill. App. 3d at 760, 652 N.E.2d at 388 (in order to preserve issue for review, defendant's post-trial motion must specify prosecution's allegedly improper and inflammatory comments during closing argument).

We now consider defendant's third argument, that the trial court erred when it decided defendant was not entitled to an evidentiary hearing or a new trial based upon newly discovered evidence. Courts look upon motions for new trial based upon newly discovered evidence with disfavor and subject them to the closest scrutiny. *People v. Cunningham,* 267 Ill. App. 3d 1009, 1017, 642 N.E.2d 781, 786 (1994). To warrant a new trial, newly discovered evidence must (1) be of such a conclusive character that it probably will change the outcome of the trial, (2) be material rather than merely cumulative, and (3) be discovered after trial and be of such a nature that it could not have been discovered prior to trial by the exercise of due diligence. *People v. Molstad,* 101 Ill. 2d 128, 461 N.E.2d 398 (1984), *modifying* 112 Ill. App. 3d 819, 445 N.E.2d 1284 (1983); *People v. Geneva,* 196 Ill. App. 3d 1017, 554 N.E.2d 556 (1990). The trial court's determination of whether a new trial is warranted will not be disturbed on review absent a manifest abuse of discretion. *Cunningham,* 4 267 Ill. App. 3d at 1017, 642 N.E.2d at 786.

We find that the proposed testimony of Jose Rocha fails to meet the requirements necessary to warrant a new trial. In Rocha's sworn statement, he reports that the shooter was shorter than 5'2" and about 14 or 15 years old. Virtually all of the defense witnesses described the shooter as young and short, yet the jury preferred to believe Mr. Carabez. Mr. Rocha's proposed testimony, therefore, strikes us as cumulative, inconclusive, and does not appear likely to change the outcome on retrial. Furthermore, we reject defense counsel's suggestion that Mr. Rocha's testimony could not have been discovered prior to trial by the exercise of due diligence. Rocha stated that he lives at 2514 S. Whipple, less than a block away from the crime scene. The record indicates that, after his arrest, defendant and defendant's mother canvassed the neighborhood around the crime scene searching for potential defense

witnesses. One such witness, Roberta Gonzalez, testified at trial. Accordingly, the alleged "new evidence" available through Jose Rocha did not warrant a new trial.

Similarly, the trial court did not abuse its discretion in rejecting the proposed post-trial testimony of Maria Balderrama. We note that on August 24, 1994, the prosecution disclosed to defense counsel that Ms. Balderrama might testify as a witness in this case. This left the defense over seven months to interview young Maria, so as to determine if she would either recognize or exculpate Julio Mendiola as the shooter. Indeed, the prosecution simultaneously disclosed Ramonita Reyes as a potential witness, and she later testified for the defense. In addition, it does not appear to us that Maria Balderrama's post-trial, court-reported statement was of such a conclusive nature that it probably would have changed the outcome on retrial. The statement appears to result from leading questions by defense counsel, and her statement that the shooter wore his hair in a ponytail contradicts the testimony of virtually every other witness that the shooter wore a hood. Therefore, the "new evidence" contained in Maria Balderrama's post-trial statement also fails to satisfy the requirements necessary to warrant a new trial. See *People v. Zurawski,* 234 Ill. App. 3d 418, 439, 600 N.E.2d 463, 476 (1992) (trial court did not abuse its discretion in failing to order a new trial in light of newly discovered evidence, where proposed testimony of one witness appeared to result from leading questions, and proposed testimony of other witness was contradicted by other evidence).

Finally, we address defendant's fourth argument, that the prosecution denied defendant a fair trial by suppressing Maria Balderrama's exculpatory statement, allegedly made during trial after she testified. Defendant correctly points out that suppression by the state of evidence favorable to an accused violates the defendant's due process rights. *Brady v. Maryland,*

373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). A prosecutor violates *Brady* when he or she fails to disclose evidence that is material to the defendant's guilt or innocence. *People v. Sims,* 167 Ill. 2d 483, 507, 658 N.E.2d 413, 424 (1995). In determining whether evidence is material, the court must focus on whether that evidence is reasonably likely to have affected the outcome of the case. *Sims,* 167 Ill. 2d at 507, 658 N.E.2d at 424.

As provided in Supreme Court Rule 366 (134 Ill. 2d R. 366(a)(4)), an appellate court may draw inferences of fact from the record before it. We find the content of Maria Balderrama's post-trial statement regarding the conduct of the assistant State's Attorneys in this case to be highly incredible. However, even were we to indulge defendant and accept Ms. Balderrama's statement as true, we cannot say that this evidence was material. As discussed above, young Maria's post-trial statement lacks credibility because it seems to result from defense counsel's leading questions and because it was contradicted by nearly every other witness. Additionally, we note that on cross-examination, defense counsel significantly undercut Maria's ability to inculpate or exculpate *any* suspect. We therefore do not consider Ms. Balderrama's post-trial statement to constitute material evidence. Hence, we hold that no *Brady* violation occurred.

For all of the above reasons, we affirm the judgment of the trial court.

Affirmed.

GALLAGHER, J., with BUCKLEY and O'BRIEN, JJ., concurring.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 30, 2000

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

---

No. 98-4031

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JULIO MENDIOLA,

*Petitioner-Appellant,*

v.

JAMES M. SCHOMIG, Warden, Pontiac Correctional Center,

*Respondent-Appellee.*

---

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 98 C 3183
Charles P. Kocoras,
*Judge.*

---

**Order**

Petitioner-appellant filed a petition for rehearing and petition for rehearing en banc on September 14, 2000. A vote

of the active members of the court was requested,* and the petition for rehearing en banc was denied by an equally divided court.** A majority of the judges on the original panel voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Chief Judge Flaum took no part in the consideration of the petition for rehearing en banc.

** Circuit judges Ripple, Rovner, Diane P. Wood, Evans and Williams voted to grant rehearing en banc.

**In the Circuit Court**
**of Cook County**

94 CR 15872

Honorable John E. Morrissey
June 26, 1995

**Excerpts from Trial Judge's Ruling on Motion for Evidentiary Hearing and Motion for a New Trial**

* * * * *

THE COURT: Mr. Villalobos, I'm ready to rule. I don't need to hear further arguments on the petition. I'm sorry.

Maria Balderamma this Court recalls testified in this court as far as I'm concerned, as far as the trier of facts gave credible testimony. Now she's altered her testimony. She's alleging matters outside the record that she told to the assistant state's attorney Robert Berlin that Julio Mendiola was not the person she saw who fired the fatal shots.

The rule of evidence governing this kind of situation is simple. Post-trial alterations, accounts given at trial or recantations, if you will, they all must be placed in the same box for purpose of ruling are accepted by any trial court with extreme caution.

Based on what I have before me, Mr. Villalobos' motion to reopen this trial, this homicide investigation is denied.

Are you ready to argue the remainder of your motion for a new trial?

MR. VILLALOBOS: What I was asking for an evidentiary hearing on this motion. That's what I was asking for, not a ruling on this motion.

THE COURT: I'm not going to grant an evidentiary hearing. There's no reason for me to do that under the law, Mr. Villalobos.

MR. VILLALOBOS: I just needed that ruling initially.

THE COURT: Motion for evidentiary hearing is denied.

* * * * *

THE COURT: In considering this motion, let me say this just so the Appellate Court finds that the record is complete.

I find there was no violations of the document Brady versus Maryland because I accept Mr. Berlin's word through the representations of Mr. Rogers here in court. Mr. Berlin being an officer of the court that he never had a conversation with Maria Balderamma or she stated that Mr. Mendiola was not the shooter. I find that conversation did not exist; that Maria Balderamma a young lady from the community for whatever motivated her, made in fact a false statement to the defense attorneys in the presence of the court reporter post-trial. That assertion due to the fact I find Mr. Berlin to be a credible outstanding state's attorney. He's not in any way encroached nondisclosure under Brady versus Maryland.

Considering the other points to this post-trial motion, it is true that but one person identified Mr. Julio Mendiola during the course of the trial testimony; however, many other witnesses came into this Court, and as far as I'm concerned circumstantially and generally corroborated and did not in fact, Mr. Villalobos, offer greatly differing testimony which would impune the identity of Mr. Mendiola. Even the defense

witnesses testified that in general the characterization of the description of the shooter generally fit Mr. Mendiola.

All, this Court recalls and lawyers will recall, stated that the shooter -- all did not substantially differ with the positive eyewitness identification of the State's principal witness.

Motion for a new trial is denied.

Are the lawyers ready now for sentencing hearing?

* * * * *

(2)

MAY

No. 00-1500

In the

# Supreme Court of the United States

**JULIO MENDIOLA,**

*Petitioner,*

v.

**JAMES M. SCHOMIG,**

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly determined that, under the AEDPA, the state court determinations at issue were entitled to a presumption of correctness?

2. Whether, the Court of Appeals properly determined that the Petitioner was not entitled to an evidentiary hearing in the United States District Court?

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## OPINION BELOW

The August 10, 2000 decision of the United States Court of Appeals for the Seventh Circuit is published at 224 F.3d 589 (7th Cir. 2000). A copy of this decision is included in the appendix to the Petition for Writ of Certiorari at pages 1a-24a. The October 30, 2000 order of the Seventh Circuit which denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is reported at 2000 U.S. App. LEXIS 27411 (7th Cir. January 3, 2001). A copy of this order is included in the appendix to the Petition for Writ of Certiorari at pages 58a-59a.

## JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on November 1, 2000, and rehearing was denied on January 3, 2001. Petitioner was granted an extension of time until March 29, 2001 in which to file his Petition for Writ of Certiorari. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

The United States District Court for the Northern District of Illinois, Eastern Division, asserted jurisdiction under 28 U.S.C. § 2254. The United States Court of Appeals for the Seventh Circuit exercised jurisdiction under 28 U.S.C. §§ 1291 and 2253. Petitioner Mendiola had appealed from a final judgment of the District Court which denied his petition for a writ of habeas corpus by a person in state custody.

An Illinois jury convicted Mendiola of first degree murder. He was sentenced to a 50-year term of imprisonment. On direct appeal, the Illinois Appellate Court, First District, affirmed the conviction. *People v. Mendiola*, (unpublished order No. 1-95-2874, issued July 21, 1997). The Illinois Supreme Court denied Wilkinson's petition for leave to appeal on December 3, 1997 (No. 83862).

On or about May 18, 1998, Mendiola filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Illinois. With the permission of the District Court, Mendiola subsequently filed, through counsel, an amended petition which raised the same four issues which had been set out in the original petition. Those issues were:

1. Whether the evidence at trial was sufficient to prove Mendiola guilty beyond a reasonable doubt;

2. Whether the introduction of "gang evidence" at trial violated Mendiola's right to due process under the Fourteenth Amendment;

3. Whether the trial judge erred in denying Mendiola's motion for a new trial based upon newly discovered evidence, and;

4. Whether Mendiola was entitled to a new trial based upon allegations that the Prosecution had withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The latter two claims were based upon a post-trial statement given by a young girl, Maria Balderama, who had testified at trial regarding the events of the murder. Balderama had given a vague general description of the murderer at trial, and had testified that she had not seen the murderer's face and that she could not identify him. In a subsequent statement, given in defense counsel's office and taken down by a court reporter, Balderama stated that, while she was testifying, she realized that Mendiola was not the murderer. She also stated that she told this fact to one of the prosecutors immediately after she had finished testifying. According to Balderama's statement, the prosecutor told her not to tell this to anyone. The district court denied the petition on October 21, 1998, without holding an evidentiary hearing. On November 24, 1998, the district court granted a certificate of appealability on all four issues.

On appeal, Mendiola claimed only that the district court had erred in holding that the state court's rejection of Mendiola's *Brady* claim constituted a reasonable application of settled law and facts. In an opinion issued on August 10, 2000, with one judge dissenting, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the district court. In doing so, the court of appeals noted that, if Balderama actually told the prosecutor what she claimed, the issue became one of the materiality of her claim that Mendiola was not the murderer. The court of appeals indicated that it would be hard to find the state court decisions on that issue to be unreasonable. The court of appeals then stated that it did not need to rest its decision on that ground. That court held that the findings of the state trial court and appellate court, that Balderama had not made the statement in question to the prosecutor, were entitled to a

presumption of correctness under 28 U.S.C. §2254, and that Mendiola had failed to rebut that presumption by clear and convincing evidence.

Mendiola filed a petition for rehearing with a suggestion for a rehearing en banc. The petition for rehearing was denied on October 30, 2000.

## REASONS FOR DENYING THE WRIT

### I. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY DETERMINED THAT, UNDER THE AEDPA, THE STATE COURT DETERMINATIONS WERE ENTITLED TO A PRESUMPTION OF CORRECTNESS.

Petitioner recognizes that, in federal habeas corpus, a determination of a factual issue made by a state court will be presumed to be correct unless the applicant has rebutted that presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. §2254(e)(1). However, Petitioner claims that the Court of Appeals failed to recognize that state court determinations of fact that are the product of inadequate procedures are not entitled to a presumption of correctness. This is not at all the basis for the Court of Appeals' decision. Rather, the Court of Appeals in this case correctly determined that, to be entitled to a presumption of correctness, a state court finding need not be the result of a full evidentiary hearing and need not be a finding made by a trial court. In support of this determination, the Court of Appeals cited precedent from this Court, from itself and from the court of appeals from other circuits. That court then went on to explain why the state court determinations were supported by the record.

In his post-trial motion in the state trial court, Petitioner claimed that the prosecutors had withheld the fact that, immediately after she left the witness stand, a 13-year-old witness, Maria Balderama, told a prosecutor that Petitioner Mendiola was not the shooter in this murder case. This claim was supported by a court reported statement Balderama had made in defense counsel's office approximately two and one-half weeks after Petitioner was convicted. The statement was the result of a "semi-deposition" of young Maria. With defense counsel and a court reporter present in defense counsel's office, defense counsel asked various questions of Maria regarding her testimony, what she saw on the night of the murder and conversations she allegedly had with the prosecutors. There was no representative of the state present at this "semi-deposition" and, therefore, no cross-examination.[1] Balderama was one of several

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[1] Respondent disagrees with Appellant's representation of how Balderama's court reported statement came about. In his statement of the case, Petitioner indicates that "Balderama approached" defense counsel and explained that she was now certain that Appellant was not the shooter and that she had said so to one of the prosecutors. (Petition for Writ of Certiorari, p. 5) This suggests that Balderama sought out defense counsel and volunteered the information. The state court record seems to indicate otherwise. Petitioner's post-trial motion does say that, after trial, Balderama came to defense counsel's office and gave the information in question. (C105-06) However, the motion does not say how or why she came to the office. When arguing the motion to the trial court, defense counsel stated that "the reason [he] went back" was that he saw Balderama smile at Appellant after she left the stand. He thought that this was unusual, and so, "[he] proceeded to talk to her." (G9) Thus, to the extent that it is relevant, it appears

(continued...)

occurrence witnesses who testified regarding a shooting which occurred on a Chicago street. While on the stand, Balderama had testified that she could not identify the shooter, that the shooter was "not that tall and not that short," that he was "not that fat and not that skinny," that she did not get a good look at the shooter, that she had not seen the shooter's face at all, that she did not remember what he was wearing and that she did not recall if, as several other people testified, he was wearing a hood. However, according to her court reported statement, Balderama realized while she was testifying that Petitioner was not the shooter because Petitioner did not have a pony tail, did not have dark skin and was taller than the shooter. She asserted in her statement that she did not know Petitioner by name but that she had seen him on three occasions in her neighborhood.

During the hearing on Petitioner's motion, after hearing the argument of defense counsel, the prosecutor (Mr. Rogers) who had been one of the two prosecutors at trial, asked for time to read Petitioner's motion. The court passed the matter. When the case was recalled, Rogers stated that he had spoken with the other prosecutor (Mr. Berlin, who was the purported recipient of Maria's post-testimony statements), and that Berlin denied that Maria ever told him that Petitioner was not the shooter. The trial judge specifically found that there had been no conversation in which Maria told the police that Petitioner was not the gunman and that Maria had given a false statement to defense counsel in the presence of the

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[1] (...continued)
that it was defense counsel who approached the 13-year-old girl, and not the other way around.

court reporter. In doing so, the trial judge accepted the denial by Mr. Berlin through the in-court representations of Mr Rogers.

The Illinois Appellate Court, in turn, also determined that the alleged statements had not been made. However, unlike the trial judge, the appellate court never mentioned the statements by Mr. Berlin and Mr. Rogers. Thus, the appellate court apparently relied upon the conflict between Maria's in-court testimony and the later statement, which had been made at defense counsel's office without the presence of opposing counsel, a judge, a jury or other citizens present. The appellate court noted that it had the authority to draw inferences of fact from the record pursuant to Illinois Supreme Court Rule 366(a)(4). The state appellate court also set forth an alternative reason for rejecting Petitioner's "*Brady*" claim. Although a prosecutor has the duty to disclose evidence favorable to the defense, a conviction will only be reversed when the undisclosed evidence is "material" such that there is a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed. *Kyles v. Whitley*, 514 U.S. 419 (1995); *Wood v. Bartholomew*, 516 U.S. 1 (1995). The appellate court found that even if Maria's court-reported statement was not viewed as being incredible, given her testimony regarding her ability to view and identify the shooter and the testimony of the other witnesses, her later statements were not material.

When it denied the petition for a writ of habeas corpus, the United States District Court first noted that the state appellate court had "raised serious questions" as to the veracity of Maria's court reported statement. However, the district court premised its ruling on the fact

that the state appellate court's determination that the "*Brady*" evidence was not material did not constitute an unreasonable application of federal law. Conversely, the United States Court of Appeals for the Seventh Circuit, agreed that the state court's "materiality" determination was, most likely, not unreasonable, but rested its decision on the factual determinations made by the state courts. The Seventh Circuit believed that the process through which the state courts had come to their decisions was sufficient, that their determinations were supported by the evidence in the record and that Petitioner had failed to rebut, by clear and convincing evidence, the presumption that those fact determinations were correct.

Petitioner claims that this determination was flawed because no full evidentiary hearing was held in the state court. To the best of Respondent's research and knowledge, this Court has never stated that state court factual determinations are only entitled to deference if they arose out of a full evidentiary hearing. In fact, this Court's holding in *Sumner v. Mata*, 549 U.S. 539, 546-47 (1981), that state appellate courts' findings are entitled to the same respect that trial judges' findings receive indicates otherwise. In *Sumner*, this Court held that a hearing was sufficient under the (then existing) language of §2254(d) when both parties were formally before the court, the defendant was given an opportunity to be heard, and his claim received plenary consideration. *Sumner*, 449 U.S. at 546. This was true even though (as will be addressed more fully below), at that time, both §§2254(d)(2) and (d)(6) referred to a full and fair hearing in the state court. *Id.* at 544-45. Notably, the Seventh Circuit relied upon *Sumner* when it decided this case. (Appendix to Petition for Writ of Certiorari,

p. 6a) Further, the Court of Appeals for the Seventh Circuit and at least one other circuit have held that a "full and fair" hearing need not be a full evidentiary hearing. The Fifth Circuit has repeatedly held that a paper hearing can be sufficient to afford a petitioner a full and fair hearing on the merits of his issue. *Murphy v. Johnson*, 205 F.3d 809, 816 (5th Cir. 2000). This is especially true where, as in the instant case, the judge assessing the issue is the same judge who presided at the trial. *Murphy*, 205 F.3d at 816. The Seventh Circuit has also previously stated that, to be sufficient, a state court hearing need not be a full-blown evidentiary hearing. The relevant question on habeas review is not so much whether a petitioner has had all the trappings of a full evidentiary hearing, but rather whether the petitioner received careful consideration and plenary processing of his claim, including full opportunity for presentation of the relevant facts. *Porter v. Gramley*, 112 F.3d 1308, 1318 (7th Cir. 1997). In *Porter*, the court held that the petitioner had had a full opportunity to present his claims even though he never received an official evidentiary hearing. *Id.*; *see also Spreitzer v. Peters*, 114 F.3d 1435, 1456 (7th Cir. 1997) (evidentiary hearing not necessary when the facts essential for consideration of the constitutional issue are already before the court). Other cases cited by the Court of Appeals in support of its finding teach that this is particularly true when, as here, the matter at issue involves recantations of statements made under oath. (Appendix to Petition, pp. 6a-7a) The Eighth Circuit noted that the need for an evidentiary hearing on a motion for a new trial is diminished when there is a claim of recanted testimony and the judge ruling on the motion observed the testimony at trial. *United States v. Provost*, 969 F.2d 617, 619 (8th Cir. 1992). That

court went on to note that, while there is contrary precedent, a majority of the Circuits hold that a recantation issue can be decided without an evidentiary hearing. *Id.*; *see cf. United States v. Stewart*, 198 F.3d 984 (7th Cir. 1999) (statements made under oath while pleading guilty are conclusive and a judge may reject without a hearing a defendant's later contention that his sworn statements were untrue). All of these circuit court holdings are consistent with the logic and holding of this Court in *Sumner*.

As further noted by the Court of Appeals below, other cases decided by this Court indicate that a full evidentiary hearing is not necessary. When dealing with allegations that prosecutors exercised peremptory challenges improperly, judges are entitled to credit prosecutors' explanations without placing them under oath. (Appendix to Petition, p. 7a) (*citing Purkett v. Elem*, 514 U.S. 765 (1995) and *Hernandez v. New York*, 500 U.S. 352 (1991))

In further support of its ruling, the Seventh Circuit noted a significant change in the Federal Habeas Corpus statute. (Appendix to Petition, p. 6a) Unlike its predecessor statute, 28 U.S.C. §2254(d) (1994), the language of §2254(e)(1) after the AEDPA does not require state court factual findings to be based on evidentiary hearings. The former statute required deference to "a determination after a hearing on the merits of a factual issue" unless one of eight conditions was satisfied. By contrast, §2254(e)(1) omits any mention of a hearing. Certainly, Congress meant for this change to have some result. Thus, the Seventh Circuit's holding that state court factual findings are entitled to a presumption of correctness even if they do not result from a full evidentiary

hearing is supported by precedent from this Court, precedent from several Circuits of the Court of Appeals, the plain language of §2254(e)(1) and by the decision of Congress to change that language.

Respondent also notes that the cases cited by Petitioner do not support his assertion. Petitioner cites to *Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999). However, *Weaver* does not involve an analysis of whether a state court's finding arose from an adequate procedure. Rather, the court in that case simply determined that the presumption of correctness did not apply because there was no "factual determination" as required by §2254(e)(1). *Weaver*, 197 F.3d at 363. *Morris v. Cain*, 186 F.3d 581 (5th Cir. 1999), to which Petitioner also cites, is similarly distinguishable. That is, it does not deal with the issue for which it is apparently cited. The language Petitioner has cited from *Morris* does not deal with the §2254(e)(1) presumption of correctness. (Petition, p. 17) Rather, that language, and the language in the cases on which *Morris* relies, deal with the deferential standard of review in federal habeas cases as set forth in §2254(d). *Morris*, 186 F.3d at 584; *Nobles v. Johnson*, 127 F.3d 409, 416 (5th Cir. 1997); *Lockhart v. Johnson*, 104 F.3d 54, 56-57 (5th Cir. 1997); *Drinkard v. Johnson*, 97 F.3d 751, 766-69 (5th Cir. 1996). Petitioner's attempt to interject §2254(d) into an analysis of the opinion below is unpersuasive. The Seventh Circuit clearly rested its decision on §2254(e)(1). (Appendix to Petition, pp. 5a-8a)

Appellant also cites to *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir. 2000) for the proposition that federal courts need not give the presumption of correctness to factual findings of the state court if the habeas petitioner did not receive a full, fair and adequate hearing in

the state court on the relevant issue. (Petition for rehearing, p. 14) Initially, this citation begs the question of what constitutes an adequate hearing. More importantly, it should not be relied upon because it is based upon pre-AEDPA law. The court in *Mayes* relied upon the case of *Nguyen v. Reynolds*, 131 F.2d 1340, 1359 (10th Cir. 1997) for the proposition cited above. *Mayes*, 210 F.3d at 1289. Unfortunately, the court in *Nguyen* declined to apply the AEDPA. *Nguyen*, 131 F.3d at 1345. Thus, that case was decided under §2254 before the change (stressed by the majority here) which removed the previous specific reference to a hearing on the merits. *See* 28 U.S.C. §2254(d)[superceded] (1995); 28 U.S.C. §2254(e)(1) (1997).

It is true that in another case cited by Petitioner, *Torres v. Prunty*, 223 F.3d 1103 (9th Cir. 2000), the Court of Appeals held that a state court's fact finding procedure was inadequate. However, that case did not involve the same factual circumstances or issue presented here. *Torres* dealt with the question of whether a defendant was competent to stand trial, not the believability of a post-trial assertion that is inconsistent with a witness's sworn testimony. More importantly, it is apparent that the holding in *Torres* was fact driven. That court stated that "[I]n light of the previous medical evaluation by Dr. Wells, it was unreasonable for the court not to make a more complete inquiry." *Torres* 223 F.3d at 1109. In support of its finding that the trial court should have held a hearing that court also stressed the fact that the defendant's counsel had twice related to the court that the defendant believed that counsel and the court were part of a broader conspiracy against the defendant and that counsel believed a competency hearing would be appropriate. *Id.* That court also stressed that the defen-

dant's unusual and self-defeating behavior in the courtroom suggested that an inquiry into his competency was required. That court also stated that "[o]n these facts" merely observing the defendant's demeanor in court was insufficient. *Id.* It later stated that under the applicable standard and "[i]n the face of this evidence" the trial judge erred when he ruled that no hearing was needed. *Id.* at 1110. Finally, that court stated that a consideration of all the evidence before the state courts led it to conclude that there had been a bona fide doubt of that defendant's competence to stand trial. *Id.* Like the court in *Torres*, the majority here conducted an analysis to determine if, on the facts in this record, the presumption of correctness should apply. It simply reached a different conclusion based upon different facts.

The Court of Appeals analyzed the basis for the state courts' decisions. Appendix to Petition, pp. 5a-8a. It cited precedent for the foundations of its determination that the decisions of the state courts reasonably determined that no "Brady" violation occurred. It cited to precedent from this Court for the proposition that the factual findings of a state appellate court are entitled to deference under §2254(e). *Id.* at 6a. It cited to two other cases from this Court for the proposition that, under some circumstances, a judge may credit the representations of prosecutors without placing the prosecutor(s) under oath. *Id.* at 7a. It cited to decisions of the Court of Appeals for the proposition that a judge may reject, without a hearing, a subsequent claim that statements made under oath were false. *Id.* at 6a-7a. It cited to yet another case from this Court and a legal treatise in support of the proposition that disbelief of recantations is reasonable. *Id.* at 7a-8a. Also, the Court of Appeals correctly noted that, after the changes made in the Antiterrorism and Effec-

tive Death Penalty Act of 1996 (the AEDPA), the subsection of §2254 which deals with the presumption of correctness no longer requires that the presumption be based upon an evidentiary hearing. *Id.* at 6a. Finally, the majority stated that if a state court's finding rests on thin air the petition will have little difficulty in satisfying the standards for relief under §2254, but that if the state court's decision is supported by the record, although not by a hearing on the merits of the factual issue, the finding is presumed to be correct. *Id.* at 6a. The Court of Appeals applied these principles to the facts of this case. It noted that the prosecutors denied the purported conversation with Balderama, that in analogous circumstances courts are entitled to credit prosecutors' explanations without placing them under oath, and that by falsely denying Balderama's post-trial assertion the two prosecutors involved in this case would be putting their law licenses and careers in jeopardy. *Id.* The majority then noted that disbelief in recantations is sensible and reasonable for several reasons. It noted the fact that, unlike the original testimony, recantations like the one here are not made under the assurances associated with in-court testimony and, conversely, may be subject to the skill and influence of the losing advocate and the perhaps less wholesome influence of the defendant's friends. *Id.* at 7-8. In this regard, the state trial judge who denied Appellant's post-trial motion was the same judge who presided at trial and, therefore, had heard Balderama's testimony and witnessed her demeanor while testifying. *Id.* at 3-4. Also, the murder here occurred outside a funeral home during the wake for a member of the Latin Kings street gang. *Id.* at 1. The majority noted that, although he denied it under oath, there was considerable evidence that Appellant

was a member of the Latin Kings. *Id.* at 2. It noted that several of the witnesses who corroborated Appellant's alibi testimony or testified that Appellant was not the shooter were Latin Kings. *Id.* It noted that while the murder occurred during broad daylight on a busy street, the police and prosecutors had difficulty finding people willing to cooperate. *Id.* at 1-2. It noted that there was testimony that Balderama was very scared and hesitated to view a line-up until she was assured that the people in the line-up could not see her. *Id.* at 3. Finally, the majority opined that people fear the Latin Kings for a reason. Of course, this statement is supported by the gang-related nature of the beating and killing involved here as well as by the fact that the jury obviously believed that Appellant and several of his witnesses perjured themselves in order to gain an acquittal for Appellant. In sum, it is perfectly clear that the Court of Appeals here held no more than that, under the facts of record in this case, the state courts each made a reasonable determination and that it is not appropriate for a federal habeas court to tamper. The Court of Appeals did not find that a federal habeas court must defer to any state court factual finding regardless of the process by which that finding was made. It correctly noted that a formal hearing was no longer a prerequisite for the presumption to apply and then explained why the inquiry and finding in this case was reasonable. In short, the majority carefully and correctly analyzed the issue before it. Therefore, this Court should not grant certiorari.

## II. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE PETITIONER WAS NOT ENTITLED TO AN EVIDENTIARY HEARING IN THE UNITED STATES DISTRICT COURT.

Petitioner next contends that the Court of Appeals ignored the difference between his entitlement to federal habeas relief and his entitlement to a hearing before the habeas court. Specifically, Petitioner claims that the majority confused the law regarding the presumption of correctness of state court findings of fact with the law regarding the right to an evidentiary hearing in a federal habeas court. In sum, Petitioner claims that the Court of Appeals remanded to the District Court for an evidentiary hearing because he did not have a full evidentiary hearing on his "Brady" claim in the state courts. Petitioner is wrong.

It is true, as Appellant states, that a habeas petitioner is entitled to an evidentiary hearing under several circumstances enumerated by this Court. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Townsend v. Sain*, 372 U.S. 293 (1963). While it is true that the question of when a federal hearing is required and when the state court findings are presumed to be correct are separate, they also overlap. J. Liebman and R. Hertz, *Federal Habeas Corpus Practice and Procedure*, Vol. I, § 20.2d, pp. 756-58, third edition (Lexus Publishing 1998). The sets of criteria for analyzing the two questions are "obviously intertwined." *Id.* at 757 (*quoting Tamayo-Reyes*, 504 U.S. at 20-21) (O'Connor, J., dissenting); *see also Keeney v. Tamayo-Reyes*, 926 F.2d 1492, 1498 and n. 13 (9th Cir. 1991), *rev'd on other grounds*, 504 U.S. 1 (same basic criteria still generally employed in both the *Townsend* and §2254(d) inquiries and in most cases the inquiries will merge).

In *Townsend*, this Court held that a habeas petitioner is entitled to an evidentiary hearing in six circumstances in which one could not be confident that the state-court trier of fact has after a full hearing reliably found the relevant facts. *Townsend*, 372 U.S. at 313. These are:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

*Id.*; *see also Federal Habeas Corpus Practice and Procedure*, §20.1b, pp. 732-33 and cases cited therein (habeas petitioner is entitled to a federal evidentiary hearing when: (1) the petition alleges facts which, if proved, entitle the petitioner to relief; (2) the fact-based claims survive summary dismissal because they are not "palpably incredible" or "patently frivolous or false," and; (3) the factual claims were not the subject of a full and fair hearing in the state courts or the state court hearing did not result in fact findings that resolve all the controlling factual issues in the case).

In substance, the inquiry into what constitutes a full and fair hearing is the same for the purposes of the questions of an evidentiary hearing or the presumption of correctness. The question is whether the state court made a factual determination on an issue after affording

a petitioner a full and fair opportunity to present the material facts. As set forth in Reason for Denying Certiorari I, a "full and fair" is not synonymous with a full formal evidentiary hearing. Moreover, as also set forth in Reason for Denying Certiorari I, the Court of Appeals here carefully and properly analyzed the issue at hand.

Finally, Petitioner's criticism of the Seventh Circuit's opinion in *Burris v. Parke*, 116 F.3d 256 (7th Cir. 1997) is wide of the mark. That case did not hold that §2254(e) limited generally a petitioner's right to an evidentiary hearing under *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) and *Townsend v. Sain*, 372 U.S. 293 (1963). That court's comments on the effect of §2254(e)(2) on the right to a hearing were made in dicta. The holding in that case was that the petitioner there was not entitled to a hearing under the standard of *Townsend*. *Burris*, 116 F.3d at 258-59. Moreover, this Court has since spoken to the effect of §2254(e)(2) on a habeas petitioner's right to a hearing in federal court. *See Williams v. Taylor*, 529 U.S. 420 (2000). Notably, the Seventh Circuit in *Burris* correctly predicted that the language of §2254(e)(2) regarding a petitioner's failure to develop the factual basis for a claim in state court could not be read in a strict-liability fashion. *Williams*, 529 U.S. at 431-32; *Burris*, 116 F.3d at 258-59. Thus, in *Burris*, the Seventh Circuit judges whom petitioner attacks correctly interpreted the law in dicta. Clearly, this does not call into question the logic of those judges in the instant case.

Finally, Petitioner claims that he is caught in a vicious catch-22 because he cannot disprove the presumption of correctness without an evidentiary hearing. (Petition, p. 22) However, a case cited by Petitioner disproves this assertion. *See Torres v. Prunty*, 223 F.3d 1103 (9th Cir.

2000). The defendant in *Torres* succeeded in doing exactly what Petitioner claims cannot be done. Based upon the state court record, which did not include a full evidentiary hearing on the issue involved, he defeated the statutory presumption of correctness and obtained relief.

## CONCLUSION

For the reasons set forth above, Respondent, James M. Schomig, respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 12 2001
OFFICE OF THE CLERK

No. 00-1500

IN THE

# Supreme Court of the United States

JULIO MENDIOLA,

*Petitioner,*

v.

JAMES M. SCHOMIG, Warden,
Pontiac Correctional Center,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF

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PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

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## INTRODUCTION

The Petition for Certiorari in this case raises two important questions. First, whether a state court's findings of fact are entitled to a presumption of correctness in habeas corpus proceedings even though the state court never held an evidentiary hearing under circumstances in which such a hearing was clearly necessary. Second, if such a presumption of correctness applies, whether a habeas petitioner is entitled to present his evidence in federal court to rebut that presumption. Respondent has attempted to avoid these questions by positing that the state courts in this case afforded Petitioner "careful consideration and plenary processing of his claim, including full opportunity for the presentation of the relevant facts." Resp. Br. at 9. This claim does not reflect the ruling of the Seventh Circuit, and is preposterous given the facts of this case.

As Judge Rovner explained in her dissent, the dispute about what Maria Balderrama told the prosecutor is a classic credibility issue. See Pet. App. 13a-15a. To make such an assessment based upon an out-of-court statement by a witness (whether that witness is a prosecutor or anyone else), without ever giving Mendiola the opportunity to present his witnesses or to cross-examine the adverse witness, cannot possibly constitute a reasonable method of determining facts. Yet, this is precisely what happened here. No state court ever heard directly from Mr. Berlin on this issue, whether through his live testimony or affidavit. Rather, the state courts relied on a cursory, unsworn, hearsay statement about what this witness (the prosecutor) had told another prosecutor.

We have no quarrel with the proposition that it is reasonable to decide *some matters* without an evidentiary

hearing. But not *all* matters can be decided in that manner, and the issue involved in this case decidedly could not be adjudicated without hearing from the relevant witnesses. Nonetheless, the Seventh Circuit held that (a) a presumption of correctness applied to the state court's determination of facts; and (b) a petitioner has no right to present his evidence in federal court to rebut that presumption. As we explain in our Petition and below, these two holdings are inconsistent with the holdings of other circuit courts of appeals and are fundamentally misguided.

## I. THE SEVENTH CIRCUIT MAJORITY FAILED TO RECOGNIZE THAT STATE COURT DETERMINATIONS OF FACT THAT ARE THE PRODUCT OF INADEQUATE PROCEDURES ARE NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS.

The Seventh Circuit engaged in a two-step analysis in concluding that a federal court should defer to state court findings without inquiring into the adequacy of the procedures leading to such findings. The first step was to focus on this Court's holding in *Sumner v. Mata*, 449 U.S. 539 (1981). In *Sumner*, there was no dispute about the adequacy of the procedures leading to the state appellate court's finding. Indeed, as this Court noted, the defendant in *Sumner* had asked the state appellate court to rule based on the trial record. All that this Court held in *Sumner* was that the word "hearing," as used in the pre-AEDPA version of section 2254(d) (1994 ed.), encompassed an appellate court hearing. The appellate court's findings were, therefore, entitled to a presumption of correctness unless one of the eight factors that rebutted the presumption under the pre-AEDPA statute applied. Significantly, several of these factors focused on the adequacy of the state-court

procedures. For example, the presumption of correctness had no force if "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing" (28 U.S.C. §2254(d)(2) (1994 ed.)); or "the material facts were not adequately developed at the State court hearing" (28 U.S.C. §2254(d)(3) 1994 ed.)); or "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding" (28 U.S.C, §2254(d)(6) (1994 ed.)).[1]

The Seventh Circuit relied upon *Sumner* for the proposition that appellate court findings are entitled to respect, but the Seventh Circuit declined to apply the next step of the analysis: asking whether the procedures leading to those findings were so plainly inadequate as to render the determination an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254 (d)(2). Nor did the Seventh Circuit recognize that a showing that a state-court decision was the product of inadequate procedures serves to rebut "the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1).

The basis of the Seventh Circuit's refusal to inquire into the adequacy of the state-court procedures was the Seventh Circuit's conclusion that AEDPA had dispensed with any such inquiry. According to the Seventh Circuit, AEDPA

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[1]The decision of the Ninth Circuit in *Vargas v. Lambert*, 159 F.3d 1161 (9th Cir. 1998), recognizes the limited impact of *Sumner*. The court explained that "*Sumner* stands for the * * * narrow proposition that the findings of a state appellate court must be afforded the same presumption of correctness that applies to findings of a state trial court." *Id.* at 1169 n.4. Neither an appellate court nor a trial court is entitled to have its factual findings control when they are not the product of adequate procedures.

> does not require findings to be based on evidentiary hearings. This is a major difference between §2254(e) * * * and its precedessor 28 U.S.C. (1994 ed.) §2254(d). The former statute required deference to "a determination after a hearing on the merits of a factual issue" unless one of eight conditions was satisfied. Section 2254(e), by contrast, omits any mention of a hearing. App. 6a.

Respondent relies heavily on this point in defending the Seventh Circuit's decision. See Resp. Br. at 8, 10, 12, 13-14. This reasoning is at odds, however, with that of several other circuit courts of appeals which have held–after the passage of AEDPA–that state court factfinding is not entitled to any deference in the absence of a "full, fair, and adequate hearing in the state court proceeding on the matter sought to be raised in the habeas petition." *Miller v. Champion*, 161 F.3d 1249, 1254 (10th Cir. 1998) (inner citation omitted). See also *Hughes v. Johnson*, 191 F.3d 607, 630 (5th Cir. 1999) (applying AEDPA and holding that a petitioner is entitled to an evidentiary hearing when "there is a factual dispute, [that,] if resolved in the petitioner's favor, would entitle [him] to relief and the state has not afforded the petitioner a full and fair evidentiary hearing") (inner citation omitted); *Thomas v. Taylor*, 170 F.3d 466 (4th Cir. 1999) (same).

These cases, together with the cases cited in the Petition for Certiorari (at 15-16), exemplify the prevailing view that there is no "major difference" between post-AEDPA and pre-AEDPA law with regard to state court

findings made in the absence of adequate procedures.[2] See 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* §20.2c, at 753 (3d ed. 1998) (section 2254(d)(2)'s demand of reasonableness incorporates the full and fair hearing requirement of the pre-AEDPA statute).

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[2]Respondent curiously argues that *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir. 2000)–one of the cases cited in our Petition–is insignificant because even though this was a case in which AEDPA was being applied, "it is based upon pre-AEDPA law." Resp. Br. at 11-12. That, of course, is our very point. Unlike the Seventh Circuit, the Tenth Circuit, along with several other circuits, has held that AEDPA did not effect a change in this area of habeas jurisprudence. See also *Barnett v. Hargett*, 174 F.3d 1128, 1136 (10th Cir. 1999) (state court hearing was not "full, fair, and adequate" without cross-examination and testing of facts by counsel). Respondent's efforts to distinguish some of the other cases cited in our Petition are equally unavailing. For example, Respondent argues that *Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999), focused on whether there had been a "factual determination" in state court. See Resp. Br. at 11. Respondent ignores the fact that the *Weaver* court ruled that there was no "factual determination" meriting deference because the trial judge's factual conclusions in that case "were not subject to any of the usual judicial procedures designed to ensure accuracy." *Weaver*, 197 F.3d at 363. Indeed the court focused explicitly on the fact that the witness in state court–a bailiff–"was not under oath when relaying her account of events to the judge" and was not "questioned by counsel for either side." *Ibid.* Respondent also seeks to distinguish *Morris v. Cain*, 186 F.3d 581 (5th Cir. 1999), by arguing that the court there was applying section 2254(d)(2), as opposed to section 2254(e). Resp. Br. at 11. This claim is flatly wrong. The Court in *Morris* cited both of these provisions, and immediately following its reference to section 2254(e)(1) declared that "[a] full and fair adjudication of a petitioner's claims in state court is a prerequisite for application of AEDPA's review provisions." *Id.* at 584 (inner citation omitted). In any event, part of the Seventh Circuit's error was refusing to apply the terms of both sections 2254(d)(2) and 2254(e)(1), both of which foreclose deference in the absence of fair and adequate state court procedures. See *Torres v. Prunty*, 223 F.3d 1103 (9th Cir. 2000) (once the state procedures are shown to have been inadequate, it follows that they are "unreasonable" as that term is used in section 2254(d)(2), and that the presumption of correctness is rebutted under section 2254(e)(1)). *Torres*, 223 F.3d at 1110 & n.6.

Although Congress revamped the structure of section 2254, and fundamentally changed the law of habeas corpus in some respects, there is absolutely no evidence that Congress intended to have federal courts defer to state court findings that were not the product of fair and adequate procedures. See generally Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 Pub. Int. L. J. 135, 141 (1996).

In an effort to reformulate the nature of the Seventh Circuit's decision, Respondent asserts that the Seventh Circuit, in fact, inquired into the adequacy of the state process in this case and held it to be reasonable. Resp. Br. at 15. There are two problems with this claim. First, it is not true to the Seventh Circuit's opinion. The Seventh Circuit clearly held that because the post-AEDPA statute omits any reference to a "hearing," federal habeas courts are no longer concerned with the nature of the state-court hearing (or whether any such hearing ever took place). Rather, federal courts are only concerned with whether the finding itself has some substantive support in the record. Pet. App. 6a-7a.[3]

The second flaw in Respondent's approach is that the procedures that were used by the Illinois courts in this case cannot possibly stand up to any scrutiny regarding their fairness and adequacy. This latter point is forcefully illustrated by the very cases upon which Respondent has relied to establish the adequacy of the procedures.

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[3]The Seventh Circuit did, of course, look to the evidence in the record that could be said to support the state courts' finding, but it did so in the course of assessing whether there was some substantive support for the finding. It never focused on the procedural fairness of the state court proceedings–the very inquiry it explicitly rejected.

For example, Respondent writes that "[t]he Fifth Circuit has repeatedly held that a paper hearing can be sufficient to afford a petitioner a full and fair hearing on the merits of his issue." Resp. Br. at 9 (citing *Murphy v. Johnson*, 205 F.3d 809, 816 (5th Cir. 2000)). In truth, Fifth Circuit precedent makes clear that the procedures used in this case would never survive that circuit's scrutiny. In *Murphy*, the court held that a "paper hearing" was adequate because defendant was making conclusory allegations without evidentiary support. *Murphy*, 205 F.3d at 817. This is a far cry from what Mendiola was claiming. The sworn affidavit from Maria Balderrama and her court-reported statement constituted her direct eyewitness account of her mid-trial encounter with the prosecutor. The Fifth Circuit treats "paper hearings" as "full and fair" hearing only in "proper circumstances" and requires the federal court to "examine in each case whether a paper hearing is appropriate to the resolution of the factual dispute underlying the petitioner's claim." *Perillo v. Johnson*, 79 F.3d 441, 446 (5th Cir. 1996) (inner citation omitted). Here, the factual dispute was one that clearly required an evidentiary hearing.

In any event, there was no "paper hearing" here. As the Fifth Circuit has explained, "[p]aper hearings are hearings where the state judge did not hear live testimony, but instead relied on affidavits." *Id.* at 446 n.7. Here, by contrast, the state courts never obtained any affidavit, statement or other direct evidence rebutting Balderrama's sworn statements. Moreover, "paper hearings" still afford the defendant the chance to present any and all evidence he wishes, albeit in affidavit form. Here, Mendiola was summarily denied any chance to present his evidence in support of Balderrama's claim because the trial court summarily denied his post-trial motion based on the prosecutor's informal out-of-court representations.

In this case, cross-examination would have provided an opportunity to explore whether Mr. Berlin was actually denying the encounter altogether, or was only denying certain details of it. As it stood, the court was relying on Mr. Rogers' version of what Mr. Berlin had said upon Mr. Berlin's having been confronted with Mr. Roger's best understanding of what Maria Balderrama had alleged.

Respondent also relies upon *United States v. Provost*, 969 F.2d 617, 619 (8th Cir. 1992), for the proposition that assessments of recantations can be decided without evidentiary hearings. Resp. Br. at 9-10. In *Provost*, however, the court held that allegations of prosecutorial misconduct are different than recantations and normally call for evidentiary hearings. *Provost*, 969 F.2d at 620 & n.2 (citing *United States v. MMR Corp.*, 954 F.2d 1040, 1046 (5th Cir. 1992)). Here, Balderrama never recanted. Her post-trial statement described events that took place after her testimony and was fully consistent with the substance of her in-court testimony. See Pet. App. at 20a-21a. Balderrama was prepared to provide direct evidence of prosecutorial misconduct, the very circumstance in which *Provost* held that a hearing is typically required.

In sum, aside from some Seventh Circuit cases that demonstrate the extent to which that circuit is in conflict with other circuits, Respondent has not presented any support for the conclusion that the Illinois courts afforded Mendiola a fair and adequate opportunity to prove his allegation. This Court should grant certiorari to resolve the conflict among the circuits as to whether AEDPA changed the traditional rule that federal courts do not defer to state court factfinding that is the product of unfair and inadequate procedures.

## II. THE SEVENTH CIRCUIT IGNORED THE CRITICAL DISTINCTION BETWEEN A DEFENDANT'S ENTITLEMENT TO FEDERAL RELIEF AND HIS ENTITLEMENT TO A FEDERAL EVIDENTIARY HEARING.

Respondent does not deny that the inquiry into a petitioner's entitlement to an evidentiary hearing is different from the question of whether a state court's findings are presumed to be correct. Respondent argues, though, that the inquiries are quite similar and that the Seventh Circuit's holding that the presumption of correctness applies here necessarily carries with it the conclusion that Mendiola was not entitled to a hearing in which he could seek to rebut that presumption. This analysis is akin to a "bait and switch."

When Justice O'Connor wrote that these two questions are "obviously intertwined" (*Keeney v. Tamayo-Reyes*, 504 U.S. 1, 20-21 (1992) (O'Connor, J., dissenting), she was referring to the presumption-of-correctness inquiry contained in the predecessor version of section 2254(d) (1994 ed.). That statute set forth eight situations rebutting the presumption of correctness. Many of these factors focused on the procedural adequacy of the state court proceeding. See *supra* at 2-3. As such, the presumption-of-correctness inquiry mirrored the hearing-related inquiry established in *Townsend v. Sain*, 372 U.S. 293 (1963).

Had the Seventh Circuit recognized, as we argue in Issue I, that the presumption-of-correctness inquiry continues to focus on these same matters, then it would be fair to say that the inquiries remain similar. But the Seventh Circuit did not ask any of these procedural questions with respect to the presumption of correctness. Thus, the hearing-related

inquiry required under *Townsend* is very different from any of the questions that the Seventh Circuit ever addressed.

Respondent agrees that a petitioner is entitled to a federal evidentiary hearing when, *inter alia*, "the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing;" or "the material facts were not adequately developed at the state-court hearing." *Townsend*, 372 U.S. at 313. Obviously, Mendiola had significant evidence he was not allowed to present during the state court proceedings. He should have been allowed to present that evidence in federal court so that he could rebut the presumption of correctness that was being applied.

As we explained in our Petition, the Seventh Circuit's approach creates a Catch-22 whereby a petitioner can never rebut the presumption of correctness by introducing the evidence he has long sought to place before a court. It is perverse for Respondent to counter this claim by pointing to *Torres v. Prunty*, 223 F.3d 1103 (9th Cir. 2000), as an example of how a petitioner can get a federal hearing. The petitioner in *Torres* secured a hearing precisely because the Ninth Circuit asked the questions that the Seventh Circuit refused to ask in this case. See Pet. at 16. The variance between *Torres* and the Seventh Circuit's decision below could hardly be more stark, and strongly supports the granting of certiorari in this case.

## CONCLUSION

For the reasons set forth above and in the Petition for Certiorari, Petitioner respectfully requests that the Court grant the relief sought in the Petition for Certiorari.

Respectfully submitted,

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JUNE 12, 2001